UNITED STATES REPORTS

VOLUME 467

CASES ADJUDGED
IN
THE SUPREME COURT
AT
OCTOBER TERM, 1983

MAY 21 THROUGH JUNE 26, 1984

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the CHIEF JUSTICE be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

Cases reported before page 1201 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1201 *et seq.* are those in which orders were entered.

Page
Aarsvold *v.* Greyhound Lines, Inc. 1253
Aberdeen & Rockfish R. Co. *v.* United States 1237
Abraham; Pekarski *v.* 1242
Abrams *v.* Martin 253
Acharya *v.* Young 1247
Agricultural Marketing & Barg. Bd.; Mich. Canners & Freezers *v.* 461
Agriculture Federal Credit Union; Holland *v.* 1229
Aiken; Gleaton *v.* 1220
Air Line Pilots *v.* Thurston 1203,1224,1239
Aispuro *v.* United States 1218
Ake *v.* Oklahoma 1239,1249
Akin *v.* Dahl 1231
Alabama; Carter *v.* 1228
Alabama; Phillips *v.* 1254
Alabama; Wabbington *v.* 1254
Alabama Power Co. *v.* Sierra Club 1248
Alabama Surface Mining Recl. Comm'n *v.* Commercial Standard Ins. 1242
Alaska; Corbin *v.* 1213,1223
Alaska; Ostrosky *v.* 1201
Alaska Mechanical, Inc.; Hydrokinetics, Inc. *v.* 1257
Albrecht, Inc. *v.* Hudson 1237
Alers *v.* Puerto Rico 1230
Alexander *v.* Jennings 1238,1248
Allegheny Mut. Casualty Co. *v.* United States 1243
Alley *v.* United States 1254
Allstate Ins. Co.; Equal Employment Opportunity Comm'n *v.* 1232
Alonso *v.* United States 1240
Altoona *v.* Equal Employment Opportunity Comm'n 1204
Aluminum Co. of America *v.* Central Lincoln Peoples' Util. Dist. 380
Alyeska Pipeline Service; Lafferty *v.* 1205

	Page
Alyeska Pipeline Service Co. *v.* Vessel Bay Ridge	1247
American Academy of Orthopaedic Surgeons; Marrese *v.*	1258
American Cast Iron Pipe Co. *v.* Pettway	1247
American Cyanamid Co.; Coleman *v.*	1215
American Iron & Steel Inst. *v.* Natural Resources Defense Council	837
American Medical Assn. *v.* Wilk	1210
American Medical Assn.; Wilk *v.*	1210
American Motors Corp. *v.* Hanna	1241
American Trucking Assns., Inc. *v.* Interstate Commerce Comm'n	1240
American Trucking Assns., Inc.; Interstate Commerce Comm'n *v.*	354
American Trucking Assns., Inc. *v.* New York State Tax Comm'n	1247
Amidon *v.* Weinberger	1248
Anderson, *In re*	1237
Anderson *v.* Bessemer City	1250
Anderson *v.* Oklahoma	1209
Antonelli *v.* Federal Bureau of Investigation	1210
Antonelli *v.* Illinois	1229
Antonelli *v.* Schryver	1217
Antonelli *v.* United States	1246
Arizona; Girdler *v.*	1244
Arizona; McCall *v.*	1220
Arizona *v.* Rumsey	203
Arkansas; Ingle *v.*	1209
Arkansas Statewide Health Coord. Council; General Hospitals *v.*	1205
Arkansas Valley Publishing Co.; Lane *v.*	1252
Armco Inc. *v.* Hardesty	638
Arnold *v.* South Carolina	1265
Arsenal Savings Assn.; Templeton *v.*	1226
Arthur; Teachers *v.*	1259
Ashland Oil, Inc. *v.* Good	1258
Ashley *v.* Grant	1208
Ashley; L. D. Butler, Inc. *v.*	1247
Ashley Trucking; L. D. Butler, Inc. *v.*	1247
Association. For labor union, see name of trade.	
Atalig *v.* Northern Mariana Islands	1244
Atkins *v.* Parker	1250
Attorney General of Mass.; Baird *v.*	1227
Attorney General of Minn. *v.* Northern States Power Co.	1256
Attorney General of N. Y. *v.* Martin	253
Attorney General of Tenn.; McDonald *v.*	1208,1257
Automobile Workers; Draper *v.*	1215
Ayers *v.* Winter	1211
Bailey *v.* United States	1229
Baird *v.* Bellotti	1227

Page
Bakery Workers; Sibley, Lindsay & Curr Co. *v.* 1259
Baldrige; Balelo *v.* 1252
Baldwin *v.* Maggio 1220,1268
Baldwin County Welcome Center *v.* Brown 1231
Balelo *v.* Baldrige 1252
Balkcom; McCorquodale *v.* 1202
Ball; School Dist. of Grand Rapids *v.* 1238
Bangor Publishing Co.; Caron *v.* 1241
Baranello & Sons *v.* Paterson 1240
Barber; Charter Consolidated, Ltd. *v.* 1205
Barfield *v.* Harris 1210
Barham *v.* United States 1230
Bartels *v.* National Labor Relations Bd. 1245
Bartow County Bd. of Tax Assessors; First National Bank *v.* 1214,1249
Batchelder; Mobil Oil Corp. *v.* 1258
Becker *v.* United States 1227
Beerbower *v.* Commissioner 1218
Beimert *v.* Burlington Northern Inc. 1216
Bell; Birmingham Linen Service *v.* 1204
Bell *v.* Eagleswood 1211
Bellotti; Baird *v.* 1227
Benson; Texas *v.* 1219
Bentley *v.* United States 1209
Bernal *v.* Fainter 216
Berrong *v.* United States 1209
Berry *v.* Foltz 1245
Berryhill *v.* Francis 1220
Berthelot *v.* United States 1249
Bessemer City; Anderson *v.* 1250
Birmingham; Carter *v.* 1211
Birmingham Linen Service *v.* Bell 1204
Biscayne Federal S. & L. Assn. *v.* Federal Home Loan Bank Bd. 1215
Black Citizens for a Fair Media *v.* FCC 1255
Blackledge *v.* Schwegmann 1206
Blake *v.* Goldman 1245
Block, *In re* 1202
Block *v.* Community Nutrition Institute 340
Block; Parker *v.* 1250
Bloom Township High School Dist. No. 206; Kneeland *v.* 1215
Blum *v.* Rosewell 1237
Board of Governors, FRS; Gustafson *v.* 1242
Board of Professional Responsibility of Tenn. Sup. Ct.; Farmer *v.* 1246
Board on Professional Responsibility of Del. Sup. Ct.; Kennedy *v.* 1205
Bonilla; Oakland Scavenger Co. *v.* 1251

Page

Bonner *v.* Philadelphia International Records 1257
Bose Corp. *v.* Consumers Union of United States, Inc. 1267
Boston *v.* United States 1268
Brackney; Miner *v.* 1259
Bradford; Smith *v.* 1230
Brady; Florida *v.* 1201
Brandon; Brown *v.* 1223
Brandon; Celeste *v.* 1223
Brandon; Flanagan *v.* 1223
Brandon *v.* Holt 1204
Braswell *v.* Flintkote Mines, Ltd. 1231
Bray *v.* Michigan 1252
Broadway *v.* United States 1246
Brookhaven; Regan *v.* 1253
Brooklyn Psychosocial Rehabilitation Institute, Inc. *v.* NLRB 1226
Brotherhood. For labor union, see name of trade.
Brown; Baldwin County Welcome Center *v.* 1231
Brown *v.* Brandon 1223
Brown *v.* Brown 1242
Brown *v.* Evans 1208
Brown *v.* Newsome 1207
Brown *v.* United States 1216
Browning *v.* United States 1246
Brown & Root, Inc.; Lewis *v.* 1231
Brown & Root, Inc. *v.* Thornton 1231
Brunner *v.* National Steel Corp. 1205
Bryner *v.* Security Pacific National Bank 1241
Buchman *v.* United States 1228
Buckmore, *In re* 1203
Buffalo; Pickering *v.* 1223
Bugher; Consolidated X-Ray Service Corp. *v.* 1207
Bumgardner *v.* United States 1214
Burche *v.* Walters 1242
Burger *v.* Zant 1212
Burks *v.* United States 1218
Burlington Northern Inc.; Beimert *v.* 1216
Burlington Northern Inc.; LaScala *v.* 1205
Burlington Northern Inc.; Marshall *v.* 1213
Burlington Northern R. Co. *v.* Lennen 1230
Burris *v.* United States 1245
Bury *v.* Macaluso 1244
Butler, Inc. *v.* Ashley 1247
Butler, Inc. *v.* Phil Ashley Trucking 1247
B & W Enterprises; Ohio *v.* 1224

Page
Byrd; Dean Witter Reynolds Inc. *v.* 1240
Byrd; Heinrich Schmidt Reederei *v.* 1252
Calandra *v.* United States 1252
Caldor, Inc.; Thornton's Estate *v.* 1203,1225,1239,1258
Calhoun *v.* Maryland 1268
California; Enright *v.* 1201
California *v.* Howard 1248
California; Koehler *v.* 1229
California; Mothershed *v.* 1228
California; Pepper *v.* 1248
California; Reimer *v.* 1201
California; Sanford *v.* 1228
California *v.* Trombetta 479
California *ex rel.* State Lands Comm'n; Summa Corp. *v.* 1231
California State Dept. of Ed. *v.* Los Angeles Branch, NAACP 1209
Capital Cities Cable, Inc. *v.* Crisp 691
Capobianco; Tilli *v.* 1217
Cardenas *v.* United States 1209
Carlock *v.* Illinois 1208
Carlton; Shelton *v.* 1206
Carlucci *v.* United States 1245
Carnivale *v.* Wisconsin 1217
Caron *v.* Bangor Publishing Co. 1241
Carpenters Pension Trust for So. Cal.; G & R Roofing Co. *v.* 1259
Carpenters Pension Trust for So. Cal. *v.* Shelter Framing Corp. 1257
Carroll; Smith *v.* 1244
Carroll *v.* United States 1241
Carter *v.* Alabama 1228
Carter *v.* Birmingham 1211
Casey *v.* Smith 1207
Castello *v.* United States 1254
CBS, Inc.; Lal *v.* 1213
Celeste *v.* Brandon 1223
Central Intelligence Agency; Sims *v.* 1240
Central Lincoln Peoples' Util. Dist.; Aluminum Co. of America *v.* 380
Central States, S. E. & S. W. Areas Pens. Fund *v.* Central Transp. 1250
Central Transp.; Central States, S. E. & S. W. Areas Pens. Fund *v.* 1250
Chaney; Heckler *v.* 1251
Chanya *v.* United States 1231
Charles F. *v.* New York 1216
Charter Consolidated, Ltd. *v.* Barber 1205
Chemical Mfrs. Assn. *v.* Natural Resources Defense Council, Inc. 1239
Cherry *v.* Marshall 1244
Chevron U. S. A., Inc. *v.* Hammond 1248

Page

Chevron U. S. A. Inc. *v.* Natural Resources Defense Council, Inc. 837
Chicago & North Western Transp. Co.; Hayfield Northern R. Co. *v.* 622
Chilcote *v.* United States 1218
Chung *v.* Immigration and Naturalization Service 1216
Cirillo *v.* Republic Steel Corp. 1213
Cities Service Oil Co. *v.* Matzen 1258
City. See name of city.
Clark *v.* Florida 1210
Clark; James *v.* 1209
Clark; Naartex Consulting Corp. *v.* 1210
Clay; Raymark Industries, Inc. *v.* 1253
Cleveland Bd. of Ed. *v.* Loudermill 1204
Cleveland Bd. of Ed.; Loudermill *v.* 1204
Cockrell *v.* United States 1251
Cody *v.* United States 1226
Cohran *v.* State Bar of Ga. 1223
Cole *v.* Georgia 39
Coleman *v.* American Cyanamid Co. 1215
Coleman *v.* Millsboro Township 1231
Coleman *v.* Spears 1229
Coleman *v.* Sussex County 1231
Collins *v.* Western Electric Co. 1254
Colorado; Graham *v.* 1216
Colorado *v.* New Mexico 310
Columbo *v.* Illinois 1208
Commercial Standard Ins. Co.; Ala. Surface Mining Recl. Comm'n *v.* 1242
Commissioner; Beerbower *v.* 1218
Commissioner; Young *v.* 1206
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Community Health Services of Crawford County, Inc.; Heckler *v.* 51,1203
Community Nutrition Institute; Block *v.* 340
Condon *v.* Maine 1204
Cone *v.* Tennessee 1210
Consolidated Precast, Inc. *v.* Paterson 1240
Consolidated Rail Corporation; Sullivan *v.* 1222
Consolidated X-Ray Service Corp. *v.* Bugher 1207
Consumers Union of United States, Inc.; Bose Corp. *v.* 1267
Cooke; Tillis *v.* 1244
Cooper *v.* Federal Reserve Bank of Richmond 867
Cooper *v.* United States 1255
Co-operative Legislative Comm. *v.* Norfolk & Western R. Co. ... 1210
Copperweld Corp. *v.* Independence Tube Corp. 752
Corbin *v.* Alaska 1213,1223

Page
Cord *v.* Neuhoff 1253
Corn *v.* Zant 1220
Corrections Commissioner. See name of commissioner.
Corwin *v.* Lehman 1227
County. See name of county.
Court, Inc. *v.* United States 1211
Crawford *v.* Mintzes 1207
Crim *v.* Hunter 1268
Crimpers Promotions Inc.; Home Box Office, Inc. *v.* 1252
Crisp; Capital Cities Cable, Inc. *v.* 691
Crockett *v.* Reagan 1251
Crossroads Hospital *v.* National Labor Relations Bd. 1204
Crowley; Furniture Moving Drivers *v.* 526
Crutchfield *v.* Fitzgerald 1229
Cunningham, *In re* 1202
Cunningham *v.* Donovan 1251
Curley *v.* Curley 1206
Cusmano *v.* United States 1252
Cuyler; Miller *v.* 1208
Daggett; Karcher *v.* 1222
Dahl; Akin *v.* 1231
Daniel *v.* Pettway 1243
Dann; United States *v.* 1214
Darden *v.* Wainwright 1230
Dawn *v.* H. Rex Greene, M. D., Inc. 1249
Dawson; Franklin Stone Products, Inc. *v.* 1205
Dawson *v.* Maggio 1244
Day; Heckler *v.* 104
Dean Witter Reynolds Inc. *v.* Byrd 1240
Decarlo *v.* United States 1206
DeFiore *v.* United States 1241
Delap *v.* Florida 1264
Delta Family-Care Disability and Survivorship Plan; Griffis *v.* 1242
Department of Energy; Mobil Oil Corp. *v.* 1255
D. E. Rogers Associates, Inc. *v.* Gardner-Denver Co. 1242
Derringer *v.* United States 1226
Detroit Plastic Molding Co. *v.* USM Corp. 1215
Director, OWCP; Todd Pacific Shipyards *v.* 1243
Director of penal or correctional institution. See name or title of director.
District Court. See U. S. District Court.
Doamarel *v.* United States 1253
Dockside Terminal Services, Inc.; Port Houston Marine, Inc. *v.* 1253
Doe *v.* United States 1246

Page
Dohm, *In re* 1250
Dole; Safir *v.* 1206,1268
Donnelly; Parma Bd. of Ed. *v.* 1204
Donovan; Cunningham *v.* 1251
Donovan; McKissick Products Co. *v.* 1215
Draper *v.* Automobile Workers 1215
Drew *v.* United States 1216
Dunagin *v.* Oxford 1259
Dunn; United States *v.* 1201
Durant *v.* United States 1246
Durham *v.* Wyrick 1217
Dutton *v.* Oklahoma 1256
Eagleswood; Bell *v.* 1211
Eastern Bancorporation *v.* Former Officers & Directors 1227
Eau Claire; Hallie *v.* 1240
Ebert *v.* Ritchey 1210
Eddy *v.* United States 1256
Eilerson *v.* Ohio 1242
Eklund *v.* United States 1249
Eleazar *v.* United States 1214
Elliott *v.* Group Hospital Service, Inc. 1215
Embers Supper Club, Inc.; Scripps-Howard Broadcasting Co. *v.* . 1226
Emery *v.* United States 1218
Employer-Sheet Metal Workers Local 544 Pens. Tr. Plan; Weiss *v.* 1267
Enright *v.* California 1201
Environmental Protection Agency *v.* NRDC 1239
Equal Employment Opportunity Comm'n *v.* Allstate Ins. Co. 1232
Equal Employment Opportunity Comm'n; Altoona *v.* 1204
Equal Employment Opportunity Comm'n; Safeway Stores, Inc. *v.* 1204
Erkins *v.* Steelworkers 1243
Escondido Mut. Water Co. *v.* La Jolla Band of Mission Indians... 1267
Estate. See name of estate.
Evans; Brown *v.* 1208
Evans *v.* Mississippi 1264
Evans *v.* United States 1255
F. *v.* New York 1216
Fainter; Bernal *v.* 216
Fair; Sanders *v.* 1254
Fant *v.* Pennsylvania 1244
Farley *v.* Saunders 1254
Farmer *v.* Board of Professional Responsibility of Tenn. Sup. Ct. 1246
Faust *v.* South Carolina State Highway Dept. 1226
Federal Bureau of Investigation; Antonelli *v.* 1210
FCC; Black Citizens for a Fair Media *v.* 1255

Page
FERC; Papago Tribal Utility Authority *v.* 1241
Federal Home Loan Bank Bd.; Biscayne Federal S. & L. Assn. *v.* 1215
Federal Reserve Bank of Richmond; Cooper *v.* 867
Feinberg, *In re* 1238
Ferguson *v.* United States 1251
Fernandez *v.* Kiner 1224
Firefighters *v.* Stotts 561
First Nat. Bank of Atlanta *v.* Bartow Cty. Bd. of Tax Assessors 1214,1249
First National Corp. of Appleton; Ma *v.* 1208
Fitzgerald; Crutchfield *v.* 1229
Flanagan *v.* Brandon 1223
Flannery *v.* United States 1226
Flick *v.* United States 1247
Flintkote Mines, Ltd.; Braswell *v.* 1231
Florida *v.* Brady 1201
Florida; Clark *v.* 1210
Florida; Delap *v.* 1264
Florida; Sims *v.* 1246
Florida; Smith *v.* 1220
Foley Construction Co. *v.* U. S. Army Corps of Engineers 1246
Foltz; Berry *v.* 1245
Ford; Wainwright *v.* 1220
Former Officers & Directors; Eastern Bancorporation *v.* 1227
Foster *v.* Lankford 1214
Foster *v.* Strickland 1268
Fothergill *v.* United States 1253
Franchise Tax Bd. of Cal. *v.* U. S. Postal Service 512
Francis; Berryhill *v.* 1220
Francis *v.* Franklin 1225
Francis; Godfrey *v.* 1231
Franklin; Francis *v.* 1225
Franklin Mint Corp. *v.* Trans World Airlines, Inc. 1231
Franklin Mint Corp.; Trans World Airlines, Inc. *v.* 1231
Franklin Stone Products, Inc. *v.* Dawson 1205
Frey; Gormon *v.* 1228
Friedland, *In re* 1258
Furniture Moving Drivers *v.* Crowley 526
Gagliardo; Stein *v.* 1242
Gallagher; Harrison *v.* 1217
Gammal *v.* Hamrock 1215
Garcia *v.* Illinois 1260
Garcia *v.* Ingram 1250
Garcia *v.* United States 1240
Garcia-Array *v.* United States 1255

Page
Gardner; Wolf *v.* 1253
Gardner-Denver Co.; D. E. Rogers Associates, Inc. *v.* 1242
Garment Workers *v.* National Labor Relations Bd. 1241
Garth *v.* United States 1208
Gee *v.* Maryland 1244
General Hospitals of Humana *v.* Ark. Statewide Health Coord. Coun. 1205
Georgia; Cole *v.* 39
Georgia; Ledesma *v.* 1241
Georgia; Merritt *v.* 1241
Georgia; Olson *v.* 1209
Georgia; Waller *v.* 39
Gerzof, *In re* 1238
Gigante *v.* United States 1206
Gilbert *v.* South Carolina 1220
Girdler *v.* Arizona 1244
Gleaton *v.* Aiken 1220
Glover; Tower *v.* 914
Godfrey *v.* Francis 1231
Goldade *v.* Wyoming 1253
Goldman; Blake *v.* 1245
Gomez-Hermanos, Inc. *v.* Secretary of Treasury of Puerto Rico 1247
Gonzalez *v.* United States 1208
Good; Ashland Oil, Inc. *v.* 1258
Gormon *v.* Frey 1228
Gottfried *v.* United States 1252
Gouveia; United States *v.* 180
Governor of Ill.; Perkins *v.* 1257
Governor of Ohio *v.* Brandon 1223
Governor of Tenn. *v.* Jennings 1238,1248
Graffagnino, *In re* 1203
Graham *v.* Colorado 1216
Gramza, *In re* 1203
Grant; Ashley *v.* 1208
Gray; Herb's Welding, Inc. *v.* 1258
Gray & Co.; Oregon-Wash. Carpenters-Employers Pension Tr. *v.* 717
Gray & Co.; Pension Benefit Guaranty Corporation *v.* 717
Greater Cleveland Regional Transit Auth.; North Olmstead *v.* 1205
Greck *v.* Superior Court of Yolo County 1217
Green; McPeek *v.* 1231
Greene, M. D., Inc.; Dawn *v.* 1249
Greyhound Lines, Inc.; Aarsvold *v.* 1253
Grievance Committee of Fifth Jud. Dist. of N. Y.; Zimmerman *v.* 1227
Griffis *v.* Delta Family-Care Disability and Survivorship Plan 1242
Griffith *v.* Wainwright 1217

Page
Group Health, Inc. *v.* Heckler 1225
Group Hospital Service, Inc.; Elliott *v.* 1215
G & R Roofing Co. *v.* Carpenters Pension Trust for So. Cal. 1259
Grumman Aerospace Co.; Pires *v.* 1228
Guardino, *In re* 1238
Gulf Oil Corp.; Palazzo *v.* 1257
Gustafson *v.* Board of Governors, FRS 1242
Guzman *v.* New Mexico 1256
Hall *v.* Illinois 1228
Hall *v.* United States 1251
Hallie *v.* Eau Claire 1240
Hammond; Chevron U. S. A., Inc. *v.* 1248
Hampshire *v.* United States 1215
Hampton County Election Comm'n; NAACP *v.* 1250
Hamrock; Gammal *v.* 1215
Hanberry; Kele *v.* 1230
Handy *v.* Peck 1253
Hanna; American Motors Corp. *v.* 1241
Hanover Radio, Inc.; Ninety-Two Point Seven Broadcasting, Inc. *v.* 1243
Hanson *v.* Illinois 1247
Hanson *v.* United States 1230
Hardesty; Armco Inc. *v.* 638
Harper & Row Publishers, Inc. *v.* Nation Enterprises 1214
Harris; Barfield *v.* 1210
Harris; Solomon *v.* 1211
Harris *v.* Texas 1261
Harrison *v.* Gallagher 1217
Hastings *v.* United States 1254
Hawaii Housing Authority *v.* Midkiff 229
Hayes *v.* Mignano 1243
Hayfield Northern R. Co. *v.* Chicago & North Western Transp. Co. 622
Heckler *v.* Chaney 1251
Heckler *v.* Community Health Services of Crawford County, Inc. 51, 1203
Heckler *v.* Day 104
Heckler; Group Health, Inc. *v.* 1225
Heckler; Holloway *v.* 1217
Heckler; Levenson *v.* 1243
Heckler *v.* Starnes 1223
Heffron; Patterson *v.* 1259
Heil Co. *v.* Meller 1206
Heinrich Schmidt Reederei *v.* Byrd 1252
Henderson *v.* United States 1218
Henry *v.* Wainwright 1268
Hensley; United States *v.* 1203

Page

Herb's Welding, Inc. *v.* Gray 1258
Hernandez *v.* Spencer 1244
Herrington *v.* Met Coal & Coke Co. 1231
High *v.* Kemp 1220
Hildebrand *v.* United States 1245
Hill *v.* United States 1230,1255
Hill *v.* Watts 1224
Hines *v.* United States 1246
Hishon *v.* King & Spalding 69
Hogan; Rhodes *v.* 1227
Holder *v.* Illinois 1241
Holderman *v.* United States 1257
Holland *v.* Agriculture Federal Credit Union 1229
Holland *v.* Office of Personnel Management 1208
Holloway *v.* Heckler 1217
Holt; Brandon *v.* 1204
Home Box Office, Inc. *v.* Crimpers Promotions Inc. 1252
Home Savings & Loan Assn. of Lawton; Walters *v.* 1223
Hood *v.* U. S. Parole Comm'n 1243
Hoopa Valley Tribe *v.* Short 1256
Hoover *v.* Ronwin 1268
Housewright; Vipperman *v.* 1217
Howard, *In re* 1237
Howard; California *v.* 1248
Howell *v.* United States 1228
H. Rex Greene, M. D., Inc.; Dawn *v.* 1249
Hudson; Albrecht, Inc. *v.* 1237
Humphrey *v.* Northern States Power Co. 1256
Hunter; Crim *v.* 1268
Hunter *v.* Reardon Smith Lines, Ltd. 1205
Hutchinson *v.* United States 1230
Hydrokinetics, Inc. *v.* Alaska Mechanical, Inc. 1257
Hyman *v.* South Carolina 1246
Hyun Joon Chung *v.* Immigration and Naturalization Service 1216
Illinois; Antonelli *v.* 1229
Illinois; Carlock *v.* 1208
Illinois; Columbo *v.* 1208
Illinois; Garcia *v.* 1260
Illinois; Hall *v.* 1228
Illinois; Hanson *v.* 1247
Illinois; Holder *v.* 1241
Illinois; Lucas *v.* 1208
Illinois *v.* Rainge 1219
Illinois; Rizzio *v.* 1244

Page
Illinois *v.* Williams 1218,1268
Immigration and Naturalization Service; Hyun Joon Chung *v.* 1216
Immigration and Naturalization Service; Longstaff *v.* 1219
Immigration and Naturalization Service; Marroquin-Manriguez *v.* 1259
Immigration and Naturalization Service; O'Rourke *v.* 1256
Immigration and Naturalization Service *v.* Stevic 407
Immigration and Naturalization Service; Thorsteinsson *v.* 1205
Independence Tube Corp.; Copperweld Corp. *v.* 752
Independent Electrical Co. *v.* Paterson 1240
Ingle *v.* Arkansas 1209
Ingram; Garcia *v.* 1250
In re. See name of party.
International. For labor union, see name of trade.
International Telephone & Telegraph Corp.; White *v.* 1220
ICC *v.* American Trucking Assns., Inc. 354
ICC; American Trucking Assns., Inc. *v.* 1240
ICC; Shippers National Freight Claim Council, Inc. *v.* 1251
Irizarry; Pershe *v.* 1237
Israel; Wells *v.* 1254
Israel; Worthing *v.* 1228
Jacks; Perryton *v.* 1268
Jackson *v.* United States 1214,1218
James *v.* Clark 1209
James *v.* Kentucky 1268
J. Baranello & Sons *v.* Paterson 1240
J. C. Penney Co.; Wambheim *v.* 1255
J. D. Court, Inc. *v.* United States 1211
Jeffco American Baptist Residences, Inc.; Mayoral *v.* 1224
Jennings; Alexander *v.* 1238,1248
Jennings *v.* United States 1227
Jermosen *v.* Smith 1229
Jerry T. O'Brien, Inc.; Securities and Exchange Comm'n *v.* 735
Johns; United States *v.* 1250
Johnson; Mabry *v.* 504
Johnson *v.* McKaskle 1220
Johnson *v.* Montana 1215
Johnson; Ohio *v.* 493
Johnson; Washington Metropolitan Area Transit Authority *v.* 925
Johnston *v.* Oklahoma 1228
Jones *v.* Mabry 1228
Jones *v.* Oklahoma 1217
Joon Chung *v.* Immigration and Naturalization Service 1216
Joseph H. Munson Co.; Secretary of State of Md. *v.* 947
Jourdan *v.* United States 1246

Page
Kageler *v.* Keohane 1230
Kahala Community Assn., Inc. *v.* Midkiff 229
Kaiser Aluminum & Chemical Corp. *v.* Parson 1243
Karcher *v.* Daggett 1222
Kavanaugh *v.* Sperry Univac 1218
Kele *v.* Hanberry 1230
Kelt *v.* Quezada 1217
Kemp; High *v.* 1220
Kemp; Stanley *v.* 1219
Kennedy *v.* Board on Professional Responsibility of Del. Sup. Ct. 1205
Kent City School Dist.; Rettig *v.* 1201,1257
Kentucky; James *v.* 1268
Keohane; Kageler *v.* 1230
Keohane; Noll *v.* 1229
Kiner; Fernandez *v.* 1224
King; Strickland *v.* 1211
King *v.* United States 1245
King & Spalding; Hishon *v.* 69
Kirby Forest Industries, Inc. *v.* United States 1
Kneeland *v.* Bloom Township High School Dist. No. 206 1215
Knott *v.* United States 1217
Koehler *v.* California 1229
Koenig *v.* New Jersey 1254
Koppe *v.* United States 1218
Korn *v.* Rabbinical Council of California 1242
Kovacs; Ohio *v.* 1224
Kuntz *v.* Winters National Bank & Trust Co. 1257
Labor Union. See name of trade.
Lacoste *v.* United States 1228
Lafferty *v.* Alyeska Pipeline Service 1205
La Jolla Band of Mission Indians; Escondido Mut. Water Co. *v.* 1267
Lal *v.* CBS, Inc. 1213
Lamar Outdoor Advertising, Inc. *v.* Mississippi State Tax Comm'n 1259
Landis *v.* United States 1230
Landreth; Landreth Timber Co. *v.* 1249
Landreth Timber Co. *v.* Landreth 1249
Lane *v.* Arkansas Valley Publishing Co. 1252
Languirand *v.* Pass Christian 1215
Lankford; Foster *v.* 1214
LaRoche *v.* United States 1245
LaScala *v.* Burlington Northern Inc. 1205
Lauchli *v.* United States 1202
Lawless *v.* Pierce 1241
Lawrence County *v.* Lead-Deadwood School Dist. No. 40–1 1248,1258

	Page
Laws *v.* Missouri	1210
L. D. Butler, Inc. *v.* Ashley	1247
L. D. Butler, Inc. *v.* Phil Ashley Trucking	1247
Lead-Deadwood School Dist. No. 40–1; Lawrence County *v.*	1248,1258
Ledesma *v.* Georgia	1241
Lee *v.* United States	1245,1253
Leech; McDonald *v.*	1208,1257
Leggett *v.* Liddell	1225
Lehman; Corwin *v.*	1227
Lemire *v.* United States	1226
Lennen; Burlington Northern R. Co. *v.*	1230
Lesko *v.* Pennsylvania	1256
Lester *v.* McGill	1247
Letts; Rothschild *v.*	1229
Levenson *v.* Heckler	1243
Levinson, *In re*	1202
Lewis *v.* Brown & Root, Inc.	1231
Lewis Service Center, Inc. *v.* Mack Trucks, Inc.	1226
Liberatore *v.* United States	1252
Licavoli *v.* United States	1252
Liddell; Leggett *v.*	1225
Liddell; Missouri *v.*	1225
Liddell; North St. Louis Parents & Citizens for Quality Ed. *v.*	1225
Lindahl *v.* Office of Personnel Management	1251
Lininger *v.* United States	1218
Lipscomb *v.* Michigan	1245
Llaguno *v.* United States	1216
Local. For labor union, see name of trade.	
Locke; United States *v.*	1225,1248
Lomas *v.* Northwestern Lehigh School Dist.	1205
London *v.* United States	1228
Lonewolf *v.* Lonewolf	1223
Longstaff *v.* Immigration and Naturalization Service	1219
Lorenzetti; United States *v.*	167
Los Angeles Branch, NAACP; California State Dept. of Ed.	1209
Los Angeles County; Rees *v.*	1205
Los Angeles County Dept. of Adoptions; Melchor *v.*	1207
Loudermill *v.* Cleveland Bd. of Ed.	1204
Loudermill; Cleveland Bd. of Ed. *v.*	1204
Louisiana; Shea *v.*	1238
Louisiana *v.* United States	1213
Louisiana Exposition; Novel *v.*	1268
Lucas *v.* Illinois	1208
Lufkins; Solem *v.*	1219

Page

Lyddan *v.* United States 1214

Lyons *v.* U. S. Air Force 1239

Ma *v.* First National Corp. of Appleton 1208

Mabry *v.* Johnson 504

Mabry; Jones *v.* 1228

Macaluso; Bury *v.* 1244

MacDonald *v.* Mountanos 1269

MacDonald *v.* Superior Court of Cal., Marin County 1269

Mack Trucks, Inc.; Lewis Service Center, Inc. *v.* 1226

Maddox *v.* United States 1214

Maggio; Baldwin *v.* 1220,1268

Maggio; Dawson *v.* 1244

Maier, *In re* 1258

Maine; Condon *v.* 1204

Maine; Vainio *v.* 1204

Majcina *v.* Majcina 1207

Maldonado *v.* New York 1207

Manago *v.* Ohio 1207

Mann, *In re* 1237

Marrese *v.* American Academy of Orthopaedic Surgeons 1258

Marroquin-Manriguez *v.* Immigration and Naturalization Service 1259

Marsh; Saunders *v.* 1227

Marshall *v.* Burlington Northern Inc. 1213

Marshall; Cherry *v.* 1244

Marshall; Roberts *v.* 1207

Martin; Abrams *v.* 253

Martin; Schall *v.* 253

Martin *v.* United States 1249

Martin Steel Corp. *v.* Owatonna Elevator Co. 1227

Martin Steel Corp. *v.* U. S. District Court 1227

Maryland; Calhoun *v.* 1268

Maryland; Gee *v.* 1244

Maryland; Mileski *v.* 1207,1268

Maryland; Rusk *v.* 1255

Maryland; Tichnell *v.* 1268

Maryland; Turner *v.* 1227

Mastrangelo *v.* United States 1204

Matzen; Cities Service Oil Co. *v.* 1258

Mayoral *v.* Jeffco American Baptist Residences, Inc. 1224

McAnlis *v.* United States 1227

McAuliffe; Struemph *v.* 1216

McCall *v.* Arizona 1220

McCorquodale *v.* Balkcom 1202

McDonald *v.* Leech 1208,1257

Page
McDonald; Real Estate One *v.* 1253
McDonald; Sandusky Real Estate, Inc. *v.* 1253
McGill; Lester *v.* 1247
McKaskle; Johnson *v.* 1220
McKaskle; Munoz *v.* 1229
McKaskle; Porter *v.* 1268
McKiness *v.* United States 1245
McKinney *v.* United States 1255
McKissick Products Co. *v.* Donovan 1215
McManus *v.* Southhampton 1206
McPeek *v.* Green 1231
Melchor *v.* Los Angeles County Dept. of Adoptions 1207
Meller; Heil Co. *v.* 1206
Member, U. S. House of Representatives *v.* Reagan 1251
Memphis Fire Dept. *v.* Stotts 561
Menominee Tribe *v.* United States 1202
Merritt *v.* Georgia 1241
Met Coal & Coke Co.; Herrington *v.* 1231
Michigan; Bray *v.* 1252
Michigan; Lipscomb *v.* 1245
Michigan Canners & Freezers Assn. *v.* Agric. Mktg. & Barg. Bd. 461
Midkiff; Hawaii Housing Authority *v.* 229
Midkiff; Kahala Community Assn., Inc. *v.* 229
Midkiff; Portlock Community Assn. (Maunalua Beach) *v.* 229
Mid-South Grizzlies *v.* National Football League 1215
Mignano; Hayes *v.* 1243
Mileski *v.* Maryland 1207,1268
Miller *v.* Cuyler 1208
Miller *v.* Port of Ilwaco 1243
Mills *v.* United States 1243
Millsboro Township; Coleman *v.* 1231
Miner *v.* Brackney 1259
Mintzes; Crawford *v.* 1207
Mintzes; Seibert *v.* 1207
Mississippi; Evans *v.* 1264
Mississippi; Tokman *v.* 1256
Mississippi State Tax Comm'n; Lamar Outdoor Advertising, Inc. *v.* 1259
Missouri; Laws *v.* 1210
Missouri *v.* Liddell 1225
Mitsubishi Motors Corp. *v.* Soler Chrysler-Plymouth, Inc. 1225
Mitsubishi Motors Corp.; Soler Chrysler-Plymouth, Inc. *v.* 1225
M & K Farms, Inc. *v.* United States 1253
Mobil Oil Corp. *v.* Batchelder 1258
Mobil Oil Corp. *v.* Department of Energy 1255

Page
Molasky *v.* Westfall 1229
Moller *v.* United States 1251
Monsanto Co.; Ruckelshaus *v.* 986
Montana; Johnson *v.* 1215
Moore *v.* United States 1204
Morgan Enterprises, Inc.; Moskowitz *v.* 1241
Morrow *v.* United States 1230
Morton; United States *v.* 822
Moskowitz *v.* Saul J. Morgan Enterprises, Inc. 1241
Moss *v.* United States 1207,1268
Mothershed *v.* California 1228
Mountanos; MacDonald *v.* 1269
Munoz *v.* McKaskle 1229
Munson Co.; Secretary of State of Md. *v.* 947
Murphy Oil Corp. *v.* Naph-Sol Refining Co. 1255
Muzychka *v.* United States 1206
M.V. Resolute; Rothmann *v.* 1242
Naartex Consulting Corp. *v.* Clark 1210
Naff *v.* Oklahoma 1254
Naph-Sol Refining Co.; Murphy Oil Corp. *v.* 1255
NAACP *v.* Hampton County Election Comm'n 1250
National Football League; Mid-South Grizzlies *v.* 1215
NLRB; Bartels *v.* 1245
NLRB; Brooklyn Psychosocial Rehabilitation Institute, Inc. *v.* 1226
NLRB; Crossroads Hospital *v.* 1204
NLRB; Garment Workers *v.* 1241
NLRB; Neuro Affiliates *v.* 1204
NLRB; Sure-Tan, Inc. *v.* 883
NLRB; U. S. Electrical Motors *v.* 1216
National Motor Freight Traffic Assn., Inc. *v.* United States 1237
National Steel Corp.; Brunner *v.* 1205
National Union Fire Ins. Co. of Pittsburgh; Robinson *v.* 1268
Nation Enterprises; Harper & Row Publishers, Inc. *v.* 1214
Natural Resources Defense Council, Inc.; Am. Iron & Steel Inst. *v.* 837
Natural Resources Defense Council, Inc.; Chemical Mfrs. Assn. *v.* 1239
Natural Resources Defense Council, Inc.; Chevron U. S. A. Inc. *v.* 837
Natural Resources Defense Council, Inc.; EPA *v.* 1239
Natural Resources Defense Council, Inc.; Ruckelshaus *v.* 837
Natural Resources Defense Council, Inc.; Union Carbide Corp. *v.* 1219
Neuhoff; Cord *v.* 1253
Neuro Affiliates *v.* National Labor Relations Bd. 1204
New Jersey; Koenig *v.* 1254
New Mexico; Colorado *v.* 310
New Mexico; Guzman *v.* 1256

Page
New Mexico; Texas *v.* 1238
Newsome; Brown *v.* 1207
New York; Charles F. *v.* 1216
New York; Maldonado *v.* 1207
New York *v.* Quarles 649
New York; Salcedo *v.* 1229
New York *v.* Uplinger 246
New York State Tax Comm'n; American Trucking Assns., Inc. *v.* 1247
Nezowy *v.* United States 1251
Ninety-Two Point Seven Broadcasting, Inc. *v.* Hanover Radio, Inc. 1243
Nix *v.* Williams 431
Noll *v.* Koehane 1229
Norfolk & Western R. Co.; Co-operative Legislative Comm. *v.* 1210
Northern Mariana Islands; Atalig *v.* 1244
Northern States Power Co.; Humphrey *v.* 1256
North Olmstead *v.* Greater Cleveland Regional Transit Auth. 1205
North Olmstead Police Dept.; Viccarone *v.* 1244
North St. Louis Parents & Citizens for Quality Ed. *v.* Liddell 1225
Northwestern Lehigh School Dist.; Lomas *v.* 1205
Novel *v.* Louisiana Exposition 1268
Oakland Scavenger Co. *v.* Bonilla 1251
Oberlin *v.* United States 1217
O'Brien, Inc.; Securities and Exchange Comm'n *v.* 735
Odom *v.* United States 1255
Office of Personnel Management; Holland *v.* 1208
Office of Personnel Management; Lindahl *v.* 1251
Ohio *v.* B & W Enterprises 1224
Ohio; Eilerson *v.* 1242
Ohio *v.* Johnson 493
Ohio *v.* Kovacs 1224
Ohio; Manago *v.* 1207
Ohio; Pembaur *v.* 1219
Ohio; Underwood *v.* 1246
Oklahoma; Ake *v.* 1239,1249
Oklahoma; Anderson *v.* 1209
Oklahoma; Dutton *v.* 1256
Oklahoma; Johnston *v.* 1228
Oklahoma; Jones *v.* 1217
Oklahoma; Naff *v.* 1254
Oklahoma; Parks *v.* 1210
Oklahoma; Robison *v.* 1246
Oklahoma; Stafford *v.* 1212
Olson *v.* Georgia 1209
Operating Engineers; Venkatesan *v.* 1218,1268

Page
Orange County *v.* Wood 1210
Oregon *v.* United States 1252
Oregon-Wash. Carpenters-Employers Pens. Tr. Fund *v.* Gray & Co. 717
O'Rourke *v.* Immigration and Naturalization Service 1256
Ostrosky *v.* Alaska 1201
Owatonna Elevator Co.; Martin Steel Corp. *v.* 1227
Oxford; Dunagin *v.* 1259
Pablo-Lugones *v.* United States 1255
Pacor, *In re* 1258
Palazzo *v.* Gulf Oil Corp. 1257
Palmer *v.* Perko 1228
Palmer *v.* United States 1246
Palmer *v.* Wainwright 1229
Palmetto State Savings & Loan Assn.; Vandross *v.* 1202
Papago Tribal Utility Authority *v.* FERC 1241
Parker; Atkins *v.* 1250
Parker *v.* Block 1250
Parker *v.* Petrovsky 1245
Parks *v.* Oklahoma 1210
Parma Bd. of Ed. *v.* Donnelly 1204
Parson; Kaiser Aluminum & Chemical Corp. *v.* 1243
Pass Christian; Languirand *v.* 1215
Paterson; Consolidated Precast, Inc. *v.* 1240
Paterson; Independent Electrical Co. *v.* 1240
Paterson; J. Baranello & Sons *v.* 1240
Patterson *v.* Heffron 1259
Patton *v.* Yount 1025
Payton *v.* United States 1208
Peck; Handy *v.* 1253
Peed *v.* United States 1219
Peick *v.* Pension Benefit Guaranty Corporation 1259
Pekarski *v.* Abraham 1242
Pembaur *v.* Ohio 1219
Penney Co.; Wambheim *v.* 1255
Pennsylvania; Fant *v.* 1244
Pennsylvania; Lesko *v.* 1256
Pennsylvania; Travaglia *v.* 1256
Pension Benefit Guaranty Corporation; Peick *v.* 1259
Pension Benefit Guaranty Corporation *v.* R. A. Gray & Co. 717
Pepper *v.* California 1248
Pepper *v.* Superior Court of Cal., Los Angeles County 1248
Perkins *v.* Thompson 1257
Perko; Palmer *v.* 1228
Perry *v.* Superintendent, Mass. Correctional Inst. at Norfolk 1217

	Page
Perryton *v.* Jacks	1268
Pershe *v.* Irizarry	1237
Petrovsky; Parker *v.*	1245
Pettway; American Cast Iron Pipe Co. *v.*	1247
Pettway; Daniel *v.*	1243
Philadelphia International Records; Bonner *v.*	1257
Phil Ashley Trucking; L. D. Butler, Inc. *v.*	1247
Phillips *v.* Alabama	1254
Pickering *v.* Buffalo	1223
Pierce; Lawless *v.*	1241
Pires *v.* Grumman Aerospace Co.	1228
Piteo *v.* United States	1206
Plath *v.* South Carolina	1265
Ponce de Leon *v.* United States	1255
Porter *v.* McKaskle	1268
Port Houston Marine, Inc. *v.* Dockside Terminal Services, Inc.	1253
Portlock Community Assn. (Maunalua Beach) *v.* Midkiff	229
Port of Ilwaco; Miller *v.*	1243
Powell *v.* United States	1254
Powell; United States *v.*	1203,1239
President of United States; Crockett *v.*	1251
Proud *v.* United States	1252
Puerto Rico; Alers *v.*	1230
Quarles; New York *v.*	649
Quezada; Kelt *v.*	1217
Quinault Indian Nation; Snow *v.*	1214
Rabbinical Council of California; Korn *v.*	1242
R. A. Gray & Co.; Ore.-Wash. Carpenters-Employers Pens. Fund *v.*	717
R. A. Gray & Co.; Pension Benefit Guaranty Corporation *v.*	717
Railway Clerks *v.* Russell	1204
Rainge; Illinois *v.*	1219
Ramos *v.* Scully	1244
Randazza *v.* United States	1218
Rangel *v.* United States	1230
Raymark Industries, Inc. *v.* Clay	1253
Reagan; Crockett *v.*	1251
Real Estate One *v.* McDonald	1253
Reardon Smith Lines, Ltd.; Hunter *v.*	1205
Redwine *v.* United States	1216
Rees *v.* Los Angeles County	1205
Regan *v.* Brookhaven	1253
Regan; Wayment *v.*	1256
Reilly *v.* United States	1245
Reimer *v.* California	1201

Page

Remson *v.* United States 1244
Republican Party of Wisconsin; Wisconsin Elections Bd. *v.* 1232
Republic Industries, Inc. *v.* Teamsters Joint Council No. 83 1259
Republic Steel Corp.; Cirillo *v.* 1213
Rettig *v.* Kent City School Dist. 1201,1257
Rhinehart *v.* Seattle Times 1230
Rhinehart; Seattle Times *v.* 20
Rhinehart; Seattle Times Co. *v.* 20
Rhodes *v.* Hogan 1227
Richardson *v.* Sheriff of Johnston County 1254
Ritchey; Ebert *v.* 1210
Rivera-Ramirez *v.* United States 1215
Rizzio *v.* Illinois 1244
Roberts *v.* Marshall 1207
Robertson *v.* United States 1213
Robinson *v.* National Union Fire Ins. Co. of Pittsburgh 1268
Robinson *v.* United States 1243
Robison *v.* Oklahoma 1246
Rodriquez-Mora *v.* United States 1208
Rogers Associates, Inc. *v.* Gardner-Denver Co. 1242
Ronwin; Hoover *v.* 1268
Rose; Tate *v.* 1249
Rosewell; Blum *v.* 1237
Rothmann *v.* M.V. Resolute 1242
Rothschild *v.* Letts 1229
Roundtree, *In re* 1224
Ruckelshaus *v.* Monsanto Co. 986
Ruckelshaus *v.* Natural Resources Defense Council, Inc. 837
Rumsey; Arizona *v.* 203
Rusk *v.* Maryland 1255
Russell; Railway Clerks *v.* 1204
Russell *v.* United States 1255
Rutledge *v.* United States 1230
Rylander; United States *v.* 1209
S.A. Empresa De Viacao Aerea Rio Grandense; United States *v.* 797
Safeway Stores, Inc. *v.* Equal Employment Opportunity Comm'n 1204
Safir *v.* Dole 1206,1268
Salcedo *v.* New York 1229
Sanders *v.* Fair 1254
Sandusky Real Estate, Inc. *v.* McDonald 1253
Sanford *v.* California 1228
Sanson *v.* United States 1264
Saul J. Morgan Enterprises, Inc.; Moskowitz *v.* 1241
Saunders; Farley *v.* 1254

Page
Saunders *v.* Marsh 1227
Saunders *v.* United States 1209
Scarborough *v.* United States 1209
Schafer *v.* United States 1241
Schaflander *v.* United States 1216
Schall *v.* Martin 253
Schettino, *In re* 1224
Schmidt *v.* Schmidt 1229
School Dist. of Grand Rapids *v.* Ball 1238
Schronce *v.* United States 1208
Schryver; Antonelli *v.* 1217
Schwartz *v.* United States 1216
Schwegmann; Blackledge *v.* 1206
Schwegmann *v.* Schwegmann 1206
Scoble *v.* United States 1254
Scott *v.* Siebel 1242
Scripps-Howard Broadcasting Co. *v.* Embers Supper Club, Inc. 1226
Scully; Ramos *v.* 1244
Sea-Hire Service, S.A. *v.* Trinidad Corp. 1242
Seattle Times *v.* Rhinehart 20
Seattle Times; Rhinehart *v.* 1230
Seattle Times Co. *v.* Rhinehart 20
Seay *v.* United States 1226
Secretary of Agriculture *v.* Community Nutrition Institute 340
Secretary of Agriculture; Parker *v.* 1250
Secretary of Army; Saunders *v.* 1227
Secretary of Commerce; Balelo *v.* 1252
Secretary of Defense; Amidon *v.* 1248
Secretary of HHS *v.* Chaney 1251
Secretary of HHS *v.* Community Health Servs. of Crawford Cty. 51,1203
Secretary of HHS *v.* Day 104
Secretary of HHS; Group Health, Inc. *v.* 1225
Secretary of HHS; Holloway *v.* 1217
Secretary of HHS; Levenson *v.* 1243
Secretary of HHS *v.* Starnes 1223
Secretary of Interior; James *v.* 1209
Secretary of Interior; Naartex Consulting Corp. *v.* 1210
Secretary of Labor; Cunningham *v.* 1251
Secretary of Labor; McKissick Products Co. *v.* 1215
Secretary of Navy; Corwin *v.* 1227
Secretary of Revenue of Kan.; Burlington Northern R. Co. *v.* 1230
Secretary of State of Md. *v.* Joseph H. Munson Co. 947
Secretary of State of Ohio *v.* Brandon 1223
Secretary of State of Tex.; Bernal *v.* 216

Page
Secretary of Transportation; Safir *v.* 1206,1268
Secretary of Treasury; Wayment *v.* 1256
Secretary of Treasury of Puerto Rico; Gomez-Hermanos, Inc. *v.* 1247
Securities and Exchange Comm'n *v.* Jerry T. O'Brien, Inc. 735
Security Pacific National Bank; Bryner *v.* 1241
Segal *v.* United States 1216
Seibert *v.* Mintzes 1207
Seitu, *In re* 1225
Selman *v.* United States 1226
Sena *v.* Winans 1244
Senn Trucking Co. *v.* Wasson 1252
Sentry Title Co.; Ward *v.* 1226
Shapiro, *In re* 1202
Sharpe; United States *v.* 1250
Shea *v.* Louisiana 1238
Sheehy, *In re* 1224
Shelter Framing Corp.; Carpenters Pension Trust for So. Cal. *v.* 1257
Shelton *v.* Carlton 1206
Sheriff of Johnston County; Richardson *v.* 1254
Shippers National Freight Claim Council, Inc. *v.* ICC 1251
Short; Hoopa Valley Tribe *v.* 1256
Shriner *v.* Wainwright 1257
Sibley, Lindsay & Curr Co. *v.* Bakery Workers 1259
Siebel; Scott *v.* 1242
Sierra Club; Alabama Power Co. *v.* 1248
Sims *v.* Central Intelligence Agency 1240
Sims *v.* Florida 1246
Slater *v.* United States 1254
Smith *v.* Bradford 1230
Smith *v.* Carroll 1244
Smith; Casey *v.* 1207
Smith *v.* Florida 1220
Smith; Jermosen *v.* 1229
Smith *v.* United States 1206
Snow *v.* Quinault Indian Nation 1214
Solem *v.* Lufkins 1219
Soler Chrysler-Plymouth, Inc. *v.* Mitsubishi Motors Corp. 1225
Soler Chrysler-Plymouth, Inc.; Mitsubishi Motors Corp. *v.* 1225
Solomon *v.* Harris 1211
Sommer, *In re* 1225
South Carolina; Arnold *v.* 1265
South Carolina; Gilbert *v.* 1220
South Carolina; Hyman *v.* 1246
South Carolina; Plath *v.* 1265

Page
South Carolina State Highway Dept.; Faust *v.* 1226
South-Central Timber Development, Inc. *v.* Wunnicke........... 82
Southern Motor Carriers Rate Conference, Inc. *v.* United States 1240
Southhampton; McManus *v.* 1206
Speaker, N. J. Assembly *v.* Daggett.................... 1222
Spears; Coleman *v.* 1229
Spencer; Hernandez *v.* 1244
Sperling *v.* United States............................. 1243
Sperry Univac; Kavanaugh *v.* 1218
Spitznagel, *In re* 1237
Stafford *v.* Oklahoma................................ 1212
Stanley *v.* Kemp.................................... 1219
Starnes; Heckler *v.* 1223
State. See name of State.
State Bar of Ga.; Cohran *v.* 1223
State Lands Comm'n; Summa Corp. *v.* 1231
Steelworkers; Erkins *v.* 1243
Steelworkers; Valenta *v.* 1252
Stein *v.* Gagliardo 1242
Stevic; Immigration and Naturalization Service *v.* 407
Stinson *v.* United States............................. 1245
Stoner, *In re*.. 1202
Stotts; Firefighters *v.* 561
Stotts; Memphis Fire Dept. *v.* 561
Strickland; Foster *v.* 1268
Strickland *v.* King 1211
Strickland *v.* Washington............................ 1267
Strong *v.* United States 1216
Struemph *v.* McAuliffe 1216
Sullivan *v.* Consolidated Rail Corporation 1222
Summa Corp. *v.* California *ex rel.* State Lands Comm'n 1231
Superintendent, Mass. Correctional Inst. at Norfolk; Perry *v.*..... 1217
Superintendent of penal or correctional institution. See also name or title of superintendent.
Superior Court of Cal., Los Angeles County; Pepper *v.*.......... 1248
Superior Court of Cal., Marin County; MacDonald *v.* 1269
Superior Court of Yolo County; Greck *v.* 1217
Sure-Tan, Inc. *v.* National Labor Relations Bd.................. 883
Sussex County; Coleman *v.* 1231
Suthoff *v.* Yazoo County Industrial Development Corp. 1206
Sutton *v.* Weirton Steel Division of National Steel Corp. 1205
Tate *v.* Rose 1249
Tax Comm'r of W. Va.; Armco Inc. *v.* 638
Taylor *v.* United States 1216,1239,1245

Page
Teachers *v.* Arthur 1259
Teamsters Jt. Council No. 83 of Va. Pension Fund; Republic Inds. *v.* 1259
Templeton *v.* Arsenal Savings Assn. 1226
Tennessee; Cone *v.* 1210
Tennessee; Washington *v.* 1208
Terrell *v.* United States 1218
Texas *v.* Benson 1219
Texas; Harris *v.* 1261
Texas *v.* New Mexico 1238
Texas; Williams *v.* 1246
Thoma *v.* United States 1228
Thomas *v.* United States 1227
Thompson; Perkins *v.* 1257
Thornton; Brown & Root, Inc. *v.* 1231
Thornton's Estate *v.* Caldor, Inc. 1203,1225,1239,1258
Thorsteinsson *v.* Immigration and Naturalization Service 1205
Threat *v.* United States 1255
Three Affiliated Tribes of Ft. Berthold Res. *v.* Wold Engineering 138
Thurston; Air Line Pilots *v.* 1203,1224,1239
Thurston; Trans World Airlines, Inc. *v.* 1203,1224,1239
Tichnell *v.* Maryland 1268
Tilli *v.* Capobianco 1217
Tillis *v.* Cooke 1244
Title Ins. Rating Bureau of Arizona, Inc. *v.* United States 1240
Todd Pacific Shipyards *v.* Director, OWCP 1243
Tokman *v.* Mississippi 1256
Tower *v.* Glover 914
Town. See name of town.
Trans World Airlines, Inc. *v.* Franklin Mint Corp. 1231
Trans World Airlines, Inc.; Franklin Mint Corp. *v.* 1231
Trans World Airlines, Inc. *v.* Thurston 1203,1224,1239
Travaglia *v.* Pennsylvania 1256
Trinidad Corp.; Sea-Hire Service, S.A. *v.* 1242
Trombetta; California *v.* 479
Turner *v.* Maryland 1227
Underwood *v.* Ohio 1246
Union. For labor union, see name of trade.
Union Carbide Corp. *v.* Natural Resources Defense Council, Inc. 1219
United. For labor union, see name of trade.
United Scottish Ins. Co.; United States *v.* 797
United States. See name of other party.
U. S. Air Force; Lyons *v.* 1239
U. S. Army Corps of Engineers; Foley Construction Co. *v.* 1246
U. S. District Court; Martin Steel Corp. *v.* 1227
U. S. Electrical Motors *v.* National Labor Relations Bd. 1216

Page
U. S. Parole Comm'n; Hood *v.* 1243
U. S. Parole Comm'n; Walker *v.* 1243
U. S. Postal Service; Franchise Tax Bd. of Cal. *v.* 512
Uplinger; New York *v.* 246
USM Corp.; Detroit Plastic Molding Co. *v.* 1215
Vainio *v.* Maine 1204
Valenta *v.* Steelworkers 1252
Vallez *v.* United States 1217
Vance *v.* Whirlpool Corp. 1226
Vandross *v.* Palmetto State Savings & Loan Assn. 1202
Varig Airlines; United States *v.* 797
Vaughn *v.* White 1207
Venkatesan *v.* Operating Engineers 1218,1268
Vessel Bay Ridge; Alyeska Pipeline Service Co. *v.* 1247
Viccarone *v.* North Olmstead Police Dept. 1244
Village. See name of village.
Vipperman *v.* Housewright 1217
Wabbington *v.* Alabama 1254
Wainwright; Darden *v.* 1230
Wainwright *v.* Ford 1220
Wainwright; Griffith *v.* 1217
Wainwright; Henry *v.* 1268
Wainwright; Palmer *v.* 1229
Wainwright; Shriner *v.* 1257
Wainwright *v.* Witt 1258
Wainwright; Young *v.* 1231
Walker *v.* U. S. Parole Comm'n 1243
Waller *v.* Georgia 39
Walters; Burche *v.* 1242
Walters *v.* Home Savings & Loan Assn. of Lawton 1223
Wambheim *v.* J. C. Penney Co. 1255
Ward *v.* Sentry Title Co. 1226
Warden. See name of warden.
Washington; Strickland *v.* 1267
Washington *v.* Tennessee 1208
Washington Metropolitan Area Transit Authority *v.* Johnson 925
Wasson; Senn Trucking Co. *v.* 1252
Watkins *v.* United States 1253
Watts; Hill *v.* 1224
Wayment *v.* Regan 1256
Wayte *v.* United States 1214
Weinberger; Amidon *v.* 1248
Weirton Steel Division of National Steel Corp.; Sutton *v.* 1205
Weiss *v.* Employer-Sheet Metal Workers Local 544 Pens. Tr. Plan 1267
Wells *v.* Israel 1254

	Page
Wells *v.* United States	1207
Western Electric Co.; Collins *v.*	1254
Westfall; Molasky *v.*	1229
Whirlpool Corp.; Vance *v.*	1226
White *v.* International Telephone & Telegraph Corp.	1220
White; Vaughn *v.*	1207
Wilk *v.* American Medical Assn.	1210
Wilk; American Medical Assn. *v.*	1210
Williams *v.* Illinois	1268
Williams; Illinois *v.*	1218
Williams; Nix *v.*	431
Williams *v.* Texas	1246
Williams *v.* United States	1245
Williams; Winslow *v.*	1206
Willis *v.* Zant	1256
Willis; Zant *v.*	1256
Wilson *v.* United States	1211
Winans; Sena *v.*	1244
Winslow *v.* Williams	1206
Winter; Ayers *v.*	1211
Winters National Bank & Trust Co.; Kuntz *v.*	1257
Wisconsin; Carnivale *v.*	1217
Wisconsin Elections Bd. *v.* Republican Party of Wisconsin	1232
Witt; Wainwright *v.*	1258
Wold Engineering; Three Affiliated Tribes of Ft. Berthold Res. *v.*	138
Wolf *v.* Gardner	1253
Wood; Orange County *v.*	1210
Woolard *v.* United States	1227
Worthing *v.* Israel	1228
Wunnicke; South-Central Timber Development, Inc. *v.*	82
Wyoming; Goldade *v.*	1253
Wyrick; Durham *v.*	1217
Yates, *In re*	1250
Yazoo County Industrial Development Corp.; Suthoff *v.*	1206
Young; Acharya *v.*	1247
Young *v.* Commissioner	1206
Young *v.* Wainwright	1231
Yount; Patton *v.*	1025
Zant; Burger *v.*	1212
Zant; Corn *v.*	1220
Zant *v.* Willis	1256
Zant; Willis *v.*	1256
Zimmerman *v.* Grievance Committee of Fifth Jud. Dist. of N. Y.	1227
Zullo *v.* United States	1230

TABLE OF CASES CITED

Page

Abbott Laboratories v. Gardner, 387 U.S. 136 350
Aberdeen & Rockfish R. Co. v. United States, 682 F. 2d 1092 358
Adamo Wrecking Co. v. United States, 434 U.S. 275 865
Addington v. Texas, 441 U.S. 418 303, 316, 424, 460
Agins v. Tiburon, 447 U.S. 255 14, 15
Alabama Power Co. v. Costle, 204 U.S. App. D. C. 51 841
Alamo Fence Co. of Houston v. United States, 240 F. 2d 179 786
Alaska v. Arctic Maid, 366 U.S. 199 643, 647
Alaska Pacific Fisheries v. United States, 248 U.S. 78 149
Albemarle Paper Co. v. Moody, 422 U.S. 405 76
Albernaz v. United States, 450 U.S. 333 499
Albert Hanson Lumber Co. v. United States, 261 U.S. 581 12
Albrecht v. Herald Co., 390 U.S. 145 764, 768, 785
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 720
Alexander v. Emerson, 489 F. 2d 285 923
Alexander v. Gardner-Denver Co., 415 U.S. 36 616
Alexander v. Louisiana, 405 U.S. 625 158
Allen v. McCurry, 449 U.S. 90 924
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 727, 733
Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380 844, 865

Page

Amalgamated Clothing Workers Rank and File Committee v. Amalgamated Clothing Workers of America, Philadelphia Joint Bd., 473 F. 2d 1303 541
Ambach v. Norwick, 441 U.S. 68 220, 225
Amell v. United States, 384 U.S. 158 1017
American Book Co. v. Kansas ex rel. Nichols, 193 U.S. 49 599
American Communications Assn. v. Douds, 339 U.S. 382 31
American Discount Corp. v. Saratoga West, Inc., 81 Wash. 2d 34 29
American Indian Agricultural Credit Consortium, Inc. v. Fredericks, 551 F. Supp. 1020 156
American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 389
American Telephone & Telegraph Co. v. United States, 299 U.S. 232 844
American Tobacco Co. v. Patterson, 456 U.S. 63 581, 587
American Tobacco Co. v. United States, 328 U.S. 781 771
American Trucking Assn., Inc. v. United States, 688 F. 2d 1337 359
American Trucking Assns., Inc. v. United States, 344 U.S. 298 365, 372
Anders v. California, 386 U.S. 738 453
Anderson v. Brand, 303 U.S. 95 1266
Anderson, Clayton & Co. v. United States, 562 F. 2d 972 836

Page

Andresen v. Maryland, 427 U.S. 463 44

Andrus v. Allard, 444 U.S. 51 14, 15, 1007

Appalachian Coals, Inc. v. United States, 288 U.S. 344 762, 763, 774

Application of National Broadcasting Co., In re, 209 U.S. App. D. C. 354 1038

Arizona v. Rumsey, 470 U.S. 203 779

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 149, 151

Arizona v. Washington, 434 U.S. 497 502

Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 77

Arizona Power Pooling Assn. v. Morton, 527 F. 2d 721 406

Armento v. Baughman, 290 N. W. 2d 11 439

Armstrong v. United States, 364 U.S. 40 14, 1003

Armstrong Cover Co. v. Whitfield, 418 F. Supp. 972 524

Aronoff v. Franchise Tax Bd., 60 Cal. 2d 177 522

ASARCO Inc. v. EPA, 188 U.S. App. D. C. 77 841, 847

Ashe v. Swenson, 397 U.S. 436 497, 498, 500

Ashwander v. TVA, 297 U.S. 288 158, 251, 972

Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519 349, 785

Associates Financial Services of America, Inc. v. Robinson, 582 F. 2d 1 519

Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 60

Aubrey v. Gadbois, 50 Cal. App. 3d 470 268

Austin v. The Aldermen, 7 Wall. 694 976

Automobile Club v. Commissioner, 353 U.S. 180 62

Page

Baker v. Carr, 369 U.S. 186 955

Baker v. Humphrey, 101 U.S. 494 921

Baker v. McCollan, 443 U.S. 137 273, 289

Baker v. Smith, 477 S. W. 2d 149 265, 268

Baldasar v. Illinois, 446 U.S. 222 295

Bank of the United States v. Deveaux, 5 Cranch 61 786

Bank of Virginia v. Tompkins, 434 F. Supp. 787 519

Barefoot v. Estelle, 463 U.S. 880 294

Barker v. Wingo, 407 U.S. 514 190, 297

Barlow v. Collins, 397 U.S. 159 346, 347, 349

Barnett v. Califano, 580 F. 2d 28 126

Barron v. United States, 5 F. 2d 799 786

Barrows v. Jackson, 346 U.S. 249 955

Bates v. State Bar of Arizona, 433 U.S. 350 957

Batterton v. Francis, 432 U.S. 416 119, 834, 844

Baxter v. Palmigiano, 425 U.S. 308 185

Beck v. Alabama, 447 U.S. 625 1261, 1267

Beck v. Washington, 369 U.S. 541 1034

Beckwith v. United States, 425 U.S. 341 654, 658, 663

Beecher v. Alabama, 389 U.S. 35 1266

Bell v. Wolfish, 441 U.S. 520 261, 264, 269, 271, 289, 291, 301

Bellotti v. Baird, 443 U.S. 622 266

Beneficial Finance Co. of New York, Inc. v. Dallas, 571 F. 2d 125 519

Bennett v. Rundle, 419 F. 2d 599 46, 47, 49

Benton v. Maryland, 395 U.S. 784 208

Page

Berenyi v. District Director, INS, 385 U.S. 630 200
Berman v. Parker, 348 U.S. 26 239–241, 243, 244, 1014
Berwind-White Coal Mining Co. v. Chicago & Erie R. Co., 235 U.S. 371 364
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 708
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 896–898
Bishop v. Wood, 426 U.S. 341 815
Bitter v. United States, 389 U.S. 15 297
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 446, 455
Black v. Cutter Laboratories, 351 U.S. 292 158, 842
Blackledge v. Allison, 431 U.S. 63 508
Blake v. Zant, 513 F. Supp. 772 1212
Blankenship v. Schweiker, 722 F. 2d 1282 115
Blankenship v. Secretary of Health and Human Services, 532 F. Supp. 739 115
Blankenship v. Secretary of HEW, 587 F. 2d 329 115, 126
Blankenship v. Secretary of HEW, No. C75–0186L(A) (WD Ky.) 115, 127
Block v. Hirsh, 256 U.S. 135 241, 242, 244, 1014
Blockburger v. United States, 284 U.S. 299 497, 499
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 697, 896
Blum v. Bacon, 457 U.S. 132 389, 844
Board of Regents v. Roth, 408 U.S. 564 288, 1001
Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 1004
Board of Trade v. ICC, 646 F. 2d 1187 360

Page

Bogart, In re, 45 Misc. 2d 1075 257
Bond v. Floyd, 385 U.S. 116 572
Bordenkircher v. Hayes, 434 U.S. 357 508
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 1038
Boston Chapter, NAACP, Inc. v. Beecher, 504 F. 2d 1017 612
Boston & Marine Corp., In re, 596 F. 2d 2 633
Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 642, 645, 647
Boykin v. Alabama, 395 U.S. 238 508
Brady v. Maryland, 373 U.S. 83 480, 484, 485, 488
Brady v. Roosevelt S.S. Co., 317 U.S. 575 518
Brady v. United States, 397 U.S. 742 508, 509
Bram v. United States, 168 U.S. 532 682
Brandt v. Hickel, 427 F. 2d 53 61
Branson v. Wirth, 17 Wall. 32 60
Breed v. Jones, 421 U.S. 519 263
Brewer v. Williams, 430 U.S. 387 188, 193, 196, 437, 450–455, 458, 672
Briscoe v. LaHue, 460 U.S. 325 920, 921
Broadrick v. Oklahoma, 413 U.S. 601 957, 958, 975, 978, 981
Brockington v. Rhodes, 396 U.S. 41 256
Brown v. Glines, 444 U.S. 348 32
Brown v. Herald Co., 464 U.S. 928 1214, 1239, 1249
Brown v. Mississippi, 297 U.S. 278 661, 682
Brown v. Ohio, 432 U.S. 161 498, 500, 501
Brown v. Texas, 443 U.S. 47 264
Brown v. United States, 113 U.S. 568 844
Brown Shoe Co. v. United States, 370 U.S. 294 768
Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 768

Page

Bryan v. Itasca County, 426 U.S. 373 149, 150

Buchanan v. Alexander, 4 How. 20 517

Buckley v. Valeo, 424 U.S. 1 32

Bull v. United States, 295 U.S. 247 523

Bullington v. Missouri, 451 U.S. 430 205, 207–215

Buncher v. NLRB, 405 F. 2d 787 901, 909

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 634

Burnet v. Chicago Portrait Co., 285 U.S. 1 843

Burnet v. Clark, 287 U.S. 410 786

Bushman v. New Holland Division, 83 Wash. 2d 429 29

Butz Engineering Corp. v. United States, 204 Ct. Cl. 561 519

Caban v. Mohammed, 441 U.S. 380 644

Cabell v. Chavez-Salido, 454 U.S. 432 220–224

Calhoon v. Harvey, 379 U.S. 134 539, 540, 548, 549, 558, 559

Calhoun v. United States, 557 F. 2d 401 826

Califano v. Boles, 443 U.S. 282 134

Califano v. Yamasaki, 442 U.S. 682 124, 135

California v. Beheler, 463 U.S. 1121 655, 663

California v. Byers, 402 U.S. 424 668

California v. Grace Brethren Church, 457 U.S. 393 515, 523, 524

California v. LaRue, 409 U.S. 109 712

California v. Stewart, 384 U.S. 436 641

California v. Taylor, 353 U.S. 553 697

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 36, 897

Page

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 698, 712–716

Calley v. Callaway, 519 F. 2d 184 1038

Cannon v. University of Chicago, 441 U.S. 677 126, 747

Cantwell v. Connecticut, 310 U.S. 296 965

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 845, 865

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 976

Carroll v. Princess Anne, 393 U.S. 175 590

Carson v. American Brands, Inc., 450 U.S. 79 588, 590, 611, 616

Cartwright Hardware Co. v. NLRB, 600 F. 2d 268 894

Caskey Baking Co. v. Virginia, 313 U.S. 117 643

Caswell v. Califano, 583 F. 2d 9 126

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y., 447 U.S. 557 696, 966, 968

Chagnon v. Schweiker, 560 F. Supp. 71 126

Chambers v. Florida, 309 U.S. 227 661, 682

Chaplinsky v. New Hampshire, 315 U.S. 568 969

Chapman v. California, 386 U.S. 18 443

Chapman v. Rudd Paint & Varnish Co., 409 F. 2d 635 770

Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 828

Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 75, 76, 828

Cheng v. Illinois, 438 F. Supp. 917 219

Cheng Kai Fu v. INS, 386 F. 2d 750 411, 415

Chevron Chemical Co. v. Costle, 443 F. Supp. 1024 993

Page
Chevron Chemical Co. v. Costle, 499 F. Supp. 732 1000
Chevron Oil Co. v. Huson, 404 U.S. 97 1234
Chicago Bd. of Trade v. United States, 246 U.S. 231 768
Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 244
Chicago & N. W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 628
Chicago & N. W. Transportation Co. v. United States, 582 F. 2d 1043 628
Chicago & N. W. Transportation Co. v. United States, 678 F. 2d 665 631
Chisholm v. United States Postal Service, 665 F. 2d 482 613
Chrysler Corp. v. Brown, 441 U.S. 281 1008, 1022
Chrysler Corp. v. United States, 316 U.S. 556 611
Cincinnati v. Vester, 281 U.S. 439 241
Citizens for a Better Environment v. Schaumburg, 590 F. 2d 220 964
City. See name of city.
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 965, 966, 968
Cliff Food Stores, Inc. v. Kroger, Inc., 417 F. 2d 203 770
Coleman v. Alabama, 399 U.S. 1 194, 196
Colonial Bank v. Broussard, 403 F. Supp. 686 520
Colorado v. New Mexico, 459 U.S. 176 312–316, 319, 320, 323, 325, 327, 334, 335
Colorado v. Nunez, 465 U.S. 324 250
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 236
Columbia Gas Transmission Corp. v. Rose, 459 U.S. 807 644
Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F. 2d 20 783

Page
Columbia Steel Co. v. State, 30 Wash. 2d 658 642, 645
Commissioner v. Shapiro, 424 U.S. 614 522
Commissioner of Internal Revenue. See Commissioner.
Commissioners of Customs and Excise v. Harz, 1 All. E. R. 177 673
Commonwealth. See also name of Commonwealth.
Commonwealth v. Yount, 435 Pa. 276 1027, 1042
Commonwealth v. Yount, 455 Pa. 303 1028
Commonwealth Edison Co. v. Montana, 453 U.S. 609 648
Commonwealth ex rel. Sprowal v. Hendrick, 438 Pa. 435 268
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 643, 648
Conley v. Gibson, 355 U.S. 41 73
Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 507
Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 644, 648
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 98, 768, 796
Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 159 619
Cooley v. Board of Wardens, 12 How. 299 87
Cooper v. United States, 594 F. 2d 12 507
Corbitt v. New Jersey, 439 U.S. 212 508
Coriolan v. INS, 559 F. 2d 993 419
Corn Products Refining Co. v. Eddy, 249 U.S. 427 1007
Cort v. Ash, 422 U.S. 66 747
Couch v. United States, 409 U.S. 322 742
Counselman v. Hitchcock, 142 U.S. 547 669
County. See name of county.
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 35, 651

Page

Craig v. Boren, 429 U.S. 190 712, 956

Craig S., In re, 57 App. Div. 2d 761 257, 264

Crosby v. Social Security Administration, 550 F. Supp. 1278 127, 129

Dahn v. Davis, 258 U.S. 421 176, 177

Dalehite v. United States, 346 U.S. 15 808, 810, 811, 813, 814, 816, 820

Danforth v. United States, 308 U.S. 271 4, 10–12, 15

Daniel v. INS, 528 F. 2d 1278 419

Data Processing Service v. Camp, 397 U.S. 150 346, 351

Davis v. Alaska, 415 U.S. 308 486

Davis v. North Carolina, 384 U.S. 737 654

Davis v. Portland Seed Co., 264 U.S. 403 364, 379

Day v. Mathews, 174 U.S. App. D. C. 231 618

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 1007

De Canas v. Bica, 424 U.S. 351 892, 893

DeFunis v. Odegaard, 416 U.S. 312 594

Delta Air Lines, Inc. v. CAB, 177 U.S. App. D. C. 100 362

Dennis v. Sparks, 449 U.S. 24 920

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 712

Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 U.S. 734 643

Detroit v. Murray Corp., 355 U.S. 489 515

Detroit Window Cleaners Local 139 Ins. Fund v. Griffin, 345 F. Supp. 1343 520

De Veau v. Braisted, 363 U.S. 144 264

Dickey v. Florida, 398 U.S. 30 194

Dillingham v. United States, 423 U.S. 64 190

Page

DiNicola v. George Hyman Construction Co., 407 A. 2d 670 934

Director, OWCP v. Rasmussen, 440 U.S. 29 934

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 98, 1002

Drs. Macht, Podore & Associates, Inc. v. Girton, 392 F. Supp. 66 520

Dombrowski v. Dowling, 459 F. 2d 190 775

Dombrowski v. Pfister, 380 U.S. 479 957

Donahey v. Edmondson, 89 Ohio St. 93 497

Donaldson v. United States, 400 U.S. 517 743, 748, 751

Donigan v. Finn, 95 Mich. App. 28 922

Donovan v. Lone Steer, Inc., 464 U.S. 408 743

Doran v. Salem Inn, Inc., 422 U.S. 922 238, 589, 601, 604

Dorchy v. Kansas, 264 U.S. 286 248

Doremus v. Board of Ed., 342 U.S. 429 954

Douglas v. Wainwright, 714 F. 2d 1532 46, 49

Driscoll v. International Union of Operating Engineers, 484 F. 2d 682 535

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 1020

Dunaway v. New York, 442 U.S. 200 658

Dunlop v. Bachowski, 421 U.S. 560 350, 539, 549, 559

Duplex Printing Press Co. v. Deering, 254 U.S. 443 786

Du Pont de Nemours Power Co. v. Masland, 244 U.S. 100 1004

Eastern Air Lines, Inc. v. Union Trust Co., 95 U.S. App. D. C. 189 811, 812

Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F. 2d 125 711

Page

Eddings v. Oklahoma, 455 U.S. 104 266

Edwards v. Arizona, 451 U.S. 477 654, 663

Edwards v. Bechtel Associates Professional Corp., 466 A. 2d 436 940

Edwards' Lessee v. Darby, 12 Wheat. 206 844

Egan v. United States, 137 F. 2d 369 786

E. I. du Pont de Nemours Power Co. v. Masland, 244 U.S. 100 1004

Eisenstadt v. Baird, 405 U.S. 438 957

Elkins v. United States, 364 U.S. 206 456

Energy Resources Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 732

Engle v. Isaac, 456 U.S. 107 1222

Enmund v. Florida, 458 U.S. 782 1260, 1261

EEOC, In re, 709 F. 2d 392 748

EEOC v. American Tel. & Tel. Co., 556 F. 2d 167 613, 618

Erznoznik v. City of Jacksonville, 422 U.S. 205 965, 968

Escobedo v. Illinois, 378 U.S. 478 188, 193–195, 197, 199, 683

Estelle v. Smith, 451 U.S. 454 188, 196, 663, 1267

Estes v. Texas, 381 U.S. 532 46

Estin v. Estin, 334 U.S. 541 828

Euclid v. Ambler, 272 U.S. 365 15

Examining Board v. Flores de Otero, 426 U.S. 572 220, 237

Ex parte. See name of party.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 242

Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100 239, 524

Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 241

Fare v. Michael C., 442 U.S. 707 658, 664, 679

Farmers Union v. WDAY, Inc., 360 U.S. 525 706

Page

FCC v. Midwest Video Corp., 440 U.S. 689 700

FCC v. Schreiber, 381 U.S. 279 745

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 60, 61, 63, 67

FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 403, 843

FHA v. Burr, 309 U.S. 242 517–521, 524

Federal Land Bank v. Priddy, 295 U.S. 229 521, 525

FMC v. Seatrain Lines, Inc., 411 U.S. 726 843

FTC v. Colgate-Palmolive Co., 380 U.S. 374 843

Felix v. Patrick, 145 U.S. 317 148

Fellows v. Blacksmith, 19 How. 366 148

Ferguson v. Moore-McCormack Lines, 352 U.S. 521 248

Ferri v. Ackerman, 444 U.S. 193 919, 920

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 899

Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141 469, 699, 709

Finnegan v. Leu, 456 U.S. 431 536, 537, 553, 556

Fiore v. Royal Painting Co., 398 So. 2d 863 933

Firefighters Institute v. City of St. Louis, 616 F. 2d 350 613

First National Bank of Boston v. Bellotti, 435 U.S. 765 966, 968

Fisher v. District Court, 424 U.S. 382 148, 161, 164

Fisher v. United States, 425 U.S. 391 653, 666, 687, 742

Flemming v. Nestor, 363 U.S. 603 269

Fleurinor v. INS, 585 F. 2d 129 419, 420

Florida v. Meyers, 466 U.S. 380 1053

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 469, 470, 478, 632, 699

Page
Foley v. Connelie, 435 U.S. 291 220, 225
Fong Foo v. United States, 369 U.S. 141 786
Ford v. Strickland, 734 F. 2d 538 1221
Ford Motor Co. v. EEOC, 458 U.S. 219 579, 583, 588
Ford Motor Co. v. NLRB, 441 U.S. 488 891
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 709
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 96, 97
Franks v. Bowman Transportation Co., 424 U.S. 747 76, 570, 572, 579, 582, 586, 612, 614, 875
Freedman v. Maryland, 380 U.S. 51 965
Freeman v. Hewit, 329 U.S. 249 642, 645
Fuentes v. Shevin, 407 U.S. 67 304, 827
Fulenwider v. Firefighters Assn. Local Union 1784, 649 S. W. 2d 268 573, 600
Furnco Construction Corp. v. Waters, 438 U.S. 567 876, 878
Gannett Co. v. DePasquale, 443 U.S. 368 33, 45–47
Gault, In re, 387 U.S. 1 259, 263–265, 282, 288, 291
Gena v. INS, 424 F. 2d 227 419
General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 583
General Electric Co. v. Gilbert, 429 U.S. 125 403
General Electric Credit Corp. v. Smith, 565 F. 2d 291 519
General Motors Corp. v. Washington, 377 U.S. 436 642, 647
General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 876, 877
George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547 783

Page
Gerstein v. Pugh, 420 U.S. 103 196, 197, 256, 262, 264, 274–277, 288
Gibbons v. Ogden, 9 Wheat. 1 627
Gibbons v. United States, 8 Wall. 269 64
Gideon v. Wainwright, 372 U.S. 335 1266
Giglio v. United States, 405 U.S. 150 61, 484, 485
Gilbert v. California, 388 U.S. 263 456, 666
Gilliard v. Mississippi, 464 U.S. 867 1262
Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 44, 45, 47
Glover v. Dolan, No. 78–8077 (CA9) 917
Glover v. Dolan, No. 77–276 (Dist. Ct. Ore.) 916, 917
G. M. Leasing Corp. v. United States, 429 U.S. 338 523
Godrey v. Georgia, 446 U.S. 420 1261, 1267
Goldberg v. United States, 425 U.S. 94 50
Goodman's Furniture Co. v. United States Postal Service, 561 F. 2d 462 519
Gourneau v. Smith, 207 N. W. 2d 256 145, 154, 156
Government of Virgin Islands v. Gereau, 502 F. 2d 914 440
Grace & Co. v. Rubber Workers, 461 U.S. 757 588, 597, 600, 605, 606
Grace Lutheran Church v. North Dakota Employment Security Bureau, 294 N. W. 2d 767 155
Graham v. Ramani, 383 So. 2d 634 219
Graham v. Richardson, 403 U.S. 365 219
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 200
Gray v. Sanders, 372 U.S. 368 586
Great Lakes Co. v. Huffman, 319 U.S. 293 524

Page

Green v. United States, 355 U.S. 184 499, 502

Greene v. Franchise Tax Bd., 27 Cal. App. 3d 38 523

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 278, 279, 291, 294

Greenville Publishing Co. v. Daily Reflector, Inc., 496 F. 2d 391 769, 770

Gregg v. Georgia, 428 U.S. 153 1211, 1212, 1219, 1220, 1246, 1256, 1264

Gregory v. Chicago, 394 U.S. 111 292

Griffin v. Griffin, 327 U.S. 220 828, 834

Griffiths, In re, 413 U.S. 717 220, 226

Guerro v. Mulhearn, 498 F. 2d 1249 923

Gulf Oil Co. v. Bernard, 452 U.S. 89 33

Gumbel v. Pitkin, 124 U.S. 131 35

Hager v. Reclamation Dist. No. 108, 111 U.S. 701 523

Hague v. CIO, 307 U.S. 496 965

Halkin, In re, 194 U.S. App. D. C. 257 25, 29, 32

Hall v. Beals, 396 U.S. 45 256

Hall v. Cole, 412 U.S. 1 538, 553, 554

Hall v. Hansen, 303 N. W. 2d 349 145, 156

Halliburton Oil Well Co. v. Reily, 373 U.S. 64 645, 647

Hannah v. Larche, 363 U.S. 420 742

Hanson Lumber Co. v. United States, 261 U.S. 581 12

Harbison v. McMurray, 138 Tex. 192 225

Harlow v. Fitzgerald, 457 U.S. 800 299

Harman v. Forssenius, 380 U.S. 528 236

Harrington v. National Outdoor Advertising Co., 355 Mo. 524 1001, 1002

Harris v. Balk, 198 U.S. 215 832

Page

Harris v. New York, 401 U.S. 222 663, 683

Harryman v. Estelle, 616 F. 2d 870 679

Hart v. Andrews, 103 Ohio St. 218 497

Hart v. United States, 95 U.S. 316 62, 64

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 1014, 1015

Haynes v. Washington, 373 U.S. 503 661, 682

H & B Equipment Co. v. International Harvester Co., 577 F. 2d 239 770, 783

Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 705

Hecht Co. v. Bowles, 321 U.S. 321 621

Heckler v. Blankenship, 465 U.S. 1301 115

Heckler v. Campbell, 461 U.S. 458 119, 129

Heckler v. Edwards, 465 U.S. 870 1234–1236

Heikkila v. Barber, 345 U.S. 229 349

Henderson v. Morgan, 426 U.S. 637 508

Henry v. INS, 552 F. 2d 130 419

Hensley v. Municipal Court, 411 U.S. 345 507

Herbert v. Lando, 441 U.S. 153 34, 35

Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 946

Herring v. New York, 422 U.S. 853 453

Hewitt v. Helms, 459 U.S. 460 198

Hicks v. Miranda, 422 U.S. 332 238

Hines v. Davidowitz, 312 U.S. 52 469, 478, 634, 699, 706

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 1005

Hodgson v. Lodge 851, International Assn. of Machinists & Aerospace Workers, AFL–CIO, 454 F. 2d 545 558

Page

Hodgson v. Steelworkers, 403 U.S. 333 549

Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 87

Hoopes v. Burnett, 26 Miss. 428 921

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 712–714

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 87

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 93, 94, 101, 103

Hughes v. Oklahoma, 441 U.S. 322 87, 92

Hurley v. Kincaid, 285 U.S. 95 1016

Hyde v. United States, 225 U.S. 347 786

Illinois v. Gates, 462 U.S. 213 665, 689

Illinois Brick Co. v. Illinois, 431 U.S. 720 784

Imbler v. Pachtman, 424 U.S. 409 920, 922

INS v. Chadha, 462 U.S. 919 1234, 1236

INS v. Delgado, 466 U.S. 210 300

INS v. Hibi, 414 U.S. 5 60, 64, 67

INS v. Jong Ha Wang, 450 U.S. 139 844

INS v. Miranda, 459 U.S. 14 60

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 1266

Indian Towing Co. v. United States, 350 U.S. 61 811–813, 815

Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F. 2d 1014 783

Ingraham v. Wright, 430 U.S. 651 288, 292

In re. See name of party or proceeding.

Insurance Co. of North America v. United States Postal Service, 675 F. 2d 756 519

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 828

Page

International Products Corp. v. Koons, 325 F. 2d 403 25, 29, 35

Investment Company Institute v. Camp, 401 U.S. 617 844

Iowa-Des Moines National Bank v. United States, 414 F. Supp. 1393 520

Irvin v. Dowd, 366 U.S. 717 1029–1037, 1052, 1054

Jackson v. Denno, 378 U.S. 368 50

Jackson v. Virginia, 443 U.S. 307 490

Jago v. Van Curen, 454 U.S. 14 507

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 100

Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561 63

Jeffers v. United States, 432 U.S. 137 502

Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories, 460 U.S. 150 102

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 789

J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 842

Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161 862

Jii v. Rhodes, 577 F. Supp. 1128 219, 225

Johnson v. New Jersey, 384 U.S. 719 188, 194, 670

Johnson v. State, 252 Ark. 1113 505

Johnson v. United States, 333 U.S. 10 653

Johnson v. Zerbst, 304 U.S. 458 189

Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 896–898

Johnston v. Baker, 445 F. 2d 424 770

Jones v. Cunningham, 371 U.S. 236 507

Jones v. Rath Packing Co., 430 U.S. 519 699

Jones Store Co. v. Hammons, 424 F. Supp. 494 524

Page

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71 770, 773

J. P. Stevens & Co. v. NLRB, 461 U.S. 490 894

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 910

Juidice v. Vail, 430 U.S. 327 923

Jurek v. Texas, 428 U.S. 262 278, 279, 295

Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 507

Kaiser Aetna v. United States, 444 U.S. 164 60, 1005, 1011

Kanarek v. Davidson, 85 Cal. App. 3d 341 522

Kashani v. INS, 547 F. 2d 376 420

Kastigar v. United States, 406 U.S. 441 442, 443, 669, 672

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 829

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 518, 521, 524

Kennedy v. Mendoza-Martinez, 372 U.S. 144 264, 269, 300

Kennedy Electric Co. v. United States Postal Service, 508 F. 2d 954 519

Kennerly v. District Court of Montana, 400 U.S. 423 151, 164

Kent v. United States, 383 U.S. 541 275, 277, 288, 307

Kercheval v. United States, 274 U.S. 220 508

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 1002

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 763–766, 773, 781, 782, 791

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F. 2d 228 764

Killian v. United States, 368 U.S. 231 487, 488

Killough v. United States, 114 U.S. App. D. C. 305 448, 455

King v. Laborers Int'l Union, Local No. 818, 443 F. 2d 273 618

Page

King v. Warickshall, 1 Leach 262 673

Kirby v. Illinois, 406 U.S. 682 185, 187–189, 193, 196

Kohl v. United States, 91 U.S. 367 9

Kolender v. Lawson, 461 U.S. 352 965

Kovac v. INS, 407 F. 2d 102 419

Kunda v. Muhlenberg College, 621 F. 2d 532 80

Kupau v. Yamamoto, 622 F. 2d 449 535

Langnes v. Green, 282 U.S. 531 842

Lanzetta v. New Jersey, 306 U.S. 451 965

Larkin v. Grendel's Den, Inc., 459 U.S. 116 712

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 1016

Las Vegas Sun, Inc. v. Summa Corp., 610 F. 2d 614 772, 783

Lauderdale v. State, 548 P. 2d 376 491

Lawhorn v. Lawhorn, 351 F. Supp. 1399 520

Lee v. Munroe, 7 Cranch 366 64

Lefkowitz v. Turley, 414 U.S. 70 670

Lego v. Twomey, 404 U.S. 477 444

Lehman v. Lycoming County Children's Services, 458 U.S. 502 265

Leland v. Oregon, 343 U.S. 790 268, 274

Lena v. INS, 379 F. 2d 536 415, 420

Leng May Ma v. Barber, 357 U.S. 185 415

Leroy v. Great Western United Corp., 443 U.S. 173 157

LeTulle v. Scofield, 308 U.S. 415 842

Levine v. United States, 362 U.S. 610 49

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 87

Page

Lieberman v. Gant, 630 F. 2d 60 80

Lincoln National Bank & Trust Co. v. Marotta, 442 F. Supp. 49 519

Linda R. S. v. Richard D., 410 U.S. 614 897, 955

Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980 579

Lodi v. Hine, 107 Wis. 2d 118 491

Lorillard v. Pons, 434 U.S. 575 126

Los Angeles v. Lyons, 461 U.S. 95 300, 590

Los Angeles County v. Davis, 440 U.S. 625 570

Lott v. United States, 367 U.S. 421 786

Louisville, C. & C. R. Co. v. Letson, 2 How. 497 786

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 1003

Lovell v. Griffin, 303 U.S. 444 964, 965

L. O. W. v. District Court of Arapahoe, 623 P. 2d 1253 266, 268

Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 77

Luckett v. Orange Julep Co., 271 Mo. 289 1001

Ludecke v. Watkins, 335 U.S. 160 349

Lugar v. Edmondson Oil Co., 457 U.S. 922 827

Lutz v. United States Postal Service, 538 F. Supp. 1129 519

Luxton v. North River Bridge Co., 153 U.S. 525 522

Lynch v. United States, 292 U.S. 571 1003

Lyons v. Oklahoma, 322 U.S. 596 661

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 241

Malloy v. Hogan, 378 U.S. 1 682

Maness v. Meyers, 419 U.S. 449 669

Page

Mapp v. Ohio, 367 U.S. 643 456

Marbury v. Madison, 1 Cranch 137 976

Marshall v. Lonberger, 459 U.S. 422 1037, 1038, 1051

Marshall v. State, 262 Ark. 726 507

Martarella v. Kelley, 359 F. Supp. 478 290

Martin v. Merola, 532 F. 2d 191 923

Martineau v. INS, 556 F. 2d 306 419

Maryland v. Louisiana, 451 U.S. 725 642, 643, 647

Massachusetts v. Upton, 466 U.S. 727 1053

Massachusetts v. Westcott, 431 U.S. 322 158

Massiah v. United States, 377 U.S. 201 454, 672

Mathews v. Eldridge, 424 U.S. 319 110, 136, 264, 274, 304, 306

Mathis v. United States, 391 U.S. 1 654, 663

May v. Anderson, 345 U.S. 528 828

May Department Stores Co. v. Williamson, 549 F. 2d 1147 519

McCarthy v. Arndstein, 266 U.S. 34 669

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 147–149

McClung v. Silliman, 6 Wheat. 598 842

McCray v. New York, 461 U.S. 961 1262

McCrea v. Busch, 164 Mont. 442 148

McDermott v. Wisconsin, 228 U.S. 115 627

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 589

McDonald v. United States, 335 U.S. 451 653

McDonnell Douglas Corp. v. Green, 411 U.S. 792 875, 880

McDonough v. Local 825, International Union of Operating Engineers, 470 F. 2d 261 535

Page

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 689
McGowan v. Maryland, 366 U.S. 420 977
McKeiver v. Pennsylvania, 403 U.S. 528 263, 268, 288
McLaren v. Fleischer, 256 U.S. 477 843, 844
McMann v. Richardson, 397 U.S. 759 508, 510
Meachum v. Fano, 427 U.S. 215 507
Meadows v. Evans, 529 F. 2d 385 923
Mempa v. Rhay, 389 U.S. 128 1267
Menges v. Dentler, 33 Pa. 495 61
Menna v. New York, 423 U.S. 61 508
Mercantile National Bank v. Langdeau, 371 U.S. 555 1017
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 126
Michelin Tire Corp. v. Wages, 423 U.S. 276 100
Michigan v. Clifford, 464 U.S. 287 483, 651
Michigan v. Long, 463 U.S. 1032 153, 497, 665
Michigan v. Mosley, 423 U.S. 96 663
Michigan v. Tucker, 417 U.S. 433 654, 663, 664, 667, 668, 670, 671, 684, 686
Michigan v. Tyler, 436 U.S. 499 653
Michigan Canners & Freezers Assn. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461 699
Middendorf v. Henry, 425 U.S. 25 261
Middlesex Ethics Committee v. Garden State Bar Assn., 457 U.S. 423 238, 239
Miller v. Barilla, 549 F. 2d 648 918
Milliken v. Bradley, 433 U.S. 267 588

Page

Mills v. Green, 159 U.S. 651 594
Milner v. Bolger, 546 F. Supp. 375 519
Mincey v. Arizona, 437 U.S. 385 653, 672
Mininsohn v. United States, 101 F. 2d 477 786
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 242
Miranda v. Arizona, 384 U.S. 436 188, 194, 197, 651–674, 677–686, 1027
Mississippi v. Arkansas, 415 U.S. 289 317
Missouri v. Hunter, 459 U.S. 359 499
Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403 241
Mobay Chemical Corp. v. Costle, 447 F. Supp. 811 993
Mobay Chemical Corp. v. Costle, 517 F. Supp. 252 1000
Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 248
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 767, 768, 784, 785
Montana v. Kennedy, 366 U.S. 308 60, 64, 67
Mooney v. Holohan, 294 U.S. 103 485
Moore v. Illinois, 408 U.S. 786 488
Moore v. Illinois, 434 U.S. 220 188, 196, 456
Morris v. D'Amario, 416 A. 2d 137 266, 268
Morris v. Gressette, 432 U.S. 491 345, 349, 350, 352
Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 179, 932
Morrissey v. Brewer, 408 U.S. 471 278, 295
Morton v. Mancari, 417 U.S. 535 1018
Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F. 2d 910 769
Moser v. United States, 341 U.S. 41 60, 62, 68

Page

Motor Coach Employees v. Lockridge, 403 U.S. 274 627
Municipal Light Boards v. FPC, 146 U.S. App. D. C. 294 359, 362
Murphy v. Florida, 421 U.S. 794 1033–1035
Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 442, 443, 669, 670, 687
Murray v. Murray, 621 F. 2d 103 524
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 720, 727
Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F. 2d 947 727
Napue v. Illinois, 360 U.S. 264 485
Nathanson v. NLRB, 344 U.S. 25 902
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 80
NAACP v. Button, 371 U.S. 415 36, 78, 80
NAACP v. Claiborne Hardware Co., 458 U.S. 886 880
National Assn. of Greeting Card Publishers v. U. S. Postal Service, 462 U.S. 810 520
National City Bank of New York v. Republic of China, 348 U.S. 356 518
National Foundation v. Fort Worth, 415 F. 2d 41 962
NLRB v. Bell Aerospace Co., 416 U.S. 267 60
NLRB v. Brown, 380 U.S. 278 843
NLRB v. Erie Resistor Corp., 373 U.S. 221 891, 896, 905
NLRB v. Food Store Employees, 417 U.S. 1 900, 905–907
NLRB v. Haberman Construction Co., 641 F. 2d 351 894
NLRB v. Hearst Publications, Inc., 322 U.S. 111 844, 891, 892
NLRB v. Holly Bra of California, Inc., 405 F. 2d 870 894
NLRB v. Iron Workers, 434 U.S. 335 891

Page

NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258 899, 902, 908
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 892
NLRB v. J. Weingarten, Inc., 420 U.S. 251 899, 905
NLRB v. Lundy Mfg. Corp., 286 F. 2d 424 896
NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 900
NLRB v. Marine Workers, 391 U.S. 418 538
NLRB v. Mastro Plastics Corp., 354 F. 2d 170 902
NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569 909
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 751
NLRB v. Seven-Up Bottling Co., 344 U.S. 344 899–901, 905, 907, 908
NLRB v. Superior Roofing Co., 460 F. 2d 1240 901, 902, 909
NLRB v. Transportation Management, Inc., 462 U.S. 393 895
National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 353
National Society of Professional Engineers v. United States, 435 U.S. 679 785
National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 542
Nebbia v. New York, 291 U.S. 502 342
Nebraska v. Wyoming, 325 U.S. 589 317
Nebraska Press Assn. v. Stuart, 427 U.S. 539 33
Nelson v. Dubois, 232 N. W. 2d 54 145, 155–157, 164
Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911 770
New Colonial Ice Co. v. Helvering, 292 U.S. 435 786
New England Power Co. v. New Hampshire, 455 U.S. 331 88, 90

Page

New Jersey v. Portash, 440 U.S. 450 670

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 147

New Motor Vehicle Bd. v. Fox Co., 439 U.S. 96 243

New Town v. United States, 454 F. 2d 121 141

New York v. Ferber, 458 U.S. 747 269, 965, 975, 977, 978

New York v. Uplinger, 467 U.S. 246 973

New York Assn. for Retarded Children, Inc. v. Carey, 706 F. 2d 956 128

New York State Liquor Authority v. Bellanca, 452 U.S. 714 603

New York Times Co. v. Sullivan, 376 U.S. 254 956

Nippert v. Richmond, 327 U.S. 416 713

Nix v. Williams, 467 U.S. 431 671, 688–690

Nolan v. Woodruff, 68 F. R. D. 660 520

North American Coal Corp. v. Huber, 268 N. W. 2d 593 155

North Carolina v. Alford, 400 U.S. 25 508

North Carolina v. Pearce, 395 U.S. 711 207, 208, 498, 499

Northern Pacific R. Co. v. United States, 356 U.S. 1 768

Northern Securities Co. v. United States, 193 U.S. 197 761

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 827

Norwood v. Harrison, 413 U.S. 455 78

Novotny v. Great Am. Fed. Sav. & Loan Assn., 584 F. 2d 1235 775

Nye & Nissen v. United States, 336 U.S. 613 786

Nyquist v. Mauclet, 432 U.S. 1 222

Ogilvie v. Fotomat Corp., 641 F. 2d 581 772, 783

Ohio v. Roberts, 448 U.S. 56 1265

Page

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 979

Oil Workers v. Missouri, 361 U.S. 363 594, 598

Oklahoma Alcoholic Beverage Control Bd. v. Heublein Wines, Int'l, 566 P. 2d 1158 695

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 33

Old Dominion Co. v. United States, 269 U.S. 55 240

Olim v. Wakinekona, 461 U.S. 238 507

Oliver, In re, 333 U.S. 257 46

Oregon v. Elstad, 61 Ore. App. 673 661

Oregon v. Glover, 32 Ore. App. 177; 33 Ore. App. 553 917

Oregon v. Hass, 420 U.S. 714 670

Oregon v. Mathiason, 429 U.S. 492 655, 663

Organized Village of Kake v. Egan, 369 U.S. 60 149

Orozco v. Texas, 394 U.S. 324 654, 659, 663, 664, 677

Ostrowski v. United States Dept. of Labor, Office of Workers Compensation Programs, 653 F. 2d 229 171–173

Ottomano v. United States, 468 F. 2d 269 1265

Owens v. Twomey, 508 F. 2d 858 440

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 632, 815

Painton & Co. v. Bourns, Inc., 442 F. 2d 216 1002

Paiz v. Hughes, 76 N. M. 562 148

Palmer v. McMahon, 133 U.S. 660 523

Palmore v. Sidoti, 460 U.S. 1018 250

Paluck v. Board of County Comm'rs, 307 N. W. 2d 852 155

Papachristou v. City of Jacksonville, 405 U.S. 156 307

Papp v. Jago, 656 F. 2d 221 440

Parker v. Brown, 317 U.S. 341 102, 470, 478

Page

Parker v. Levy, 417 U.S. 733 959, 965
Parker v. North Carolina, 397 U.S. 790 508, 510
Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 586, 587, 610
Passarelli Columbia Engineering and Contracting Co., 270 N. Y. 68 933
Patsy v. Florida Bd. of Regents, 457 U.S. 496 923
Patterson v. American Tobacco Co., 535 F. 2d 257 579
Patterson v. Greenwood School Dist. 50, 696 F. 2d 293 618
Patterson v. United States, 222 F. 599 786
Paul v. INS, 521 F. 2d 194 419
Pauley v. Gross, 1 Kan. App. 2d 736 268
Payne v. Arkansas, 356 U.S. 560 661
Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 910
Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247 728, 732
Penn Central Transportation Co. v. New York City, 438 U.S. 104 14, 1005
Pennoyer v. Neff, 95 U.S. 714 828
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 14, 1005, 1007
People v. Defore, 242 N. Y. 13 447, 448, 455
People v. Hitch, 12 Cal. 3d 641 483, 484
People v. Jones, 47 N. Y. 2d 409 49
People v. Martin, 50 N. Y. 1029 689
People v. Miller, 52 Cal. App. 3d 666 484
People v. Onofre, 51 N. Y. 2d 476 247–249
People v. Tutt, 38 N. Y. 2d 1011 690

Page

People ex rel. Wayburn v. Schupf, 39 N. Y. 2d 682 256, 261, 264–266, 268, 273, 279, 280, 291, 296, 299
People of Puerto Rico v. Eastern Sugar Associates, 156 F. 2d 316 242
PepsiCo v. SEC, 563 F. Supp. 828 750
Pereira-Diaz v. INS, 551 F. 2d 1149 419, 420
Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 153, 157, 497, 498
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 765, 772, 782
Permian Basin Area Rate Cases, 390 U.S. 747 365
Petrolite Corp. v. United States Environmental Protection Agency, 519 F. Supp. 966 1000
Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 518
Phelps v. United States, 274 U.S. 341 11
Pheips Dodge Corp. v. NLRB, 313 U.S. 177 899–901, 908
Philadelphia v. New Jersey, 437 U.S. 617 100
Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603 733
Philbrook v. Glodgett, 421 U.S. 707 828
Photovest Corp. v. Fotomat Corp., 606 F. 2d 704 759, 772, 783
Pierson v. Ray, 386 U.S. 547 920
Pike v. Bruce Church, Inc., 397 U.S. 137 100, 101
Pine River Logging Co. v. United States, 186 U.S. 279 62, 64
Poafpybitty v. Skelly Oil Co., 390 U.S. 365 148
Poitra v. Demarrias, 502 F. 2d 23 156
Polk County v. Dodson, 454 U.S. 312 453, 919, 920

Page

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464; 109 U.S. App. D. C. 170 770

Porter v. Warner Holding Co., 328 U.S. 395 124

Portmann v. United States, 674 F. 2d 1155 519

Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 932

Powell v. McCormack, 395 U.S. 486 571, 572

Power Reactor Co. v. Electricians, 367 U.S. 396 390

Preiser v. Rodriguez, 411 U.S. 475 923

Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 45, 47–49

Price v. Georgia, 398 U.S. 323 502

Probst v. Southern Stevedoring Co., 379 F. 2d 763 936, 937

Procunier v. Martinez, 416 U.S. 396 32, 34, 38

Prudential Ins. Co. v. Benjamin, 328 U.S. 408 88

PruneYard Shopping Center v. Robins, 447 U.S. 74 1005

Pulliam v. Allen, 466 U.S. 522 920

Queen v. Ramasamy, [1965] A. C. 1 673

Railroad Comm'n v. Pullman Co., 312 U.S. 496 236, 237

Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330 727, 733

Railway Employees v. Wright, 364 U.S. 642 576, 611

Railway Mail Assn. v. Corsi, 326 U.S. 88 78

Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 147

Randall v. Franchise Tax Bd., 453 F. 2d 381 523

Rasmussen v. Hardin, 461 F. 2d 595 345

Ray v. Atlantic Richfield Co., 435 U.S. 151 708

Page

Rayonier, Inc. v. United States, 352 U.S. 315 813

Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U.S. 81 518, 521

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 152

Reddi-Wip, Inc. v. Lemay Valve Co., 354 S. W. 2d 913 1001, 1002

Reese v. Danforth, 486 Pa. 479 922

Reeves, Inc. v. Stake, 447 U.S. 429 93–96, 103

Regional Rail Reorganization Act Cases, 419 U.S. 102 1017–1020

Reisman v. Caplin, 375 U.S. 440 748

Rejaie v. INS, 691 F. 2d 139 413

Republic Industries, Inc. v. Teamsters Joint Council, 718 F. 2d 628 728

Republic Steel Corp. v. NLRB, 311 U.S. 7 905

Rescue Army v. Municipal Court, 331 U.S. 549 251

Reyes v. INS, 693 F. 2d 597 413

Reynolds v. United States, 98 U.S. 145 1037, 1050–1052

Rhode Island v. Innis, 446 U.S. 291 188, 654, 656, 659, 663, 677, 680

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 469, 699

Rice v. Sioux City Cemetery, 349 U.S. 70 250

Richardson v. Perales, 402 U.S. 389 106

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 45

Rideau v. Louisiana, 373 U.S. 723 1038

Riley Investment Co. v. Commissioner, 311 U.S. 55 842

Rindge Co. v. Los Angeles, 262 U.S. 700 241, 244, 1014

Rios v. Enterprise Assn. Steamfitters Local 638, 501 F. 2d 622 613

Page
Roberts v. United States, 445 U.S. 552 666
Rochin v. California, 342 U.S. 165 269
Rock Island, A. & L. R. Co. v. United States, 254 U.S. 141 63
Rodriguez v. Compass Shipping Co., 451 U.S. 596 934, 935, 939, 942
Roe v. Wade, 410 U.S. 113 593
Rogers v. Lodge, 458 U.S. 613 928
Rolette County v. Eltobgi, 221 N. W. 2d 645 157
Rondel v. Worsley, [1969] 1 A. C. 191 921
Rosenberg v. Yee Chien Woo, 402 U.S. 49 415, 428
Rosewell v. LaSalle National Bank, 450 U.S. 503 524
Ross v. International Brotherhood of Electrical Workers, 513 F. 2d 840 541
Roviaro v. United States, 353 U.S. 53 485
Rummel v. Estelle, 445 U.S. 263 269
Runyon v. McCrary, 427 U.S. 160 78, 815
Rushen v. Spain, 464 U.S. 114 677, 1036, 1037, 1051
Russell Motor Car Co. v. United States, 261 U.S. 514 860
Ryerson v. United States, 312 U.S. 405 842
Saia v. New York, 334 U.S. 558 965
St. Regis Paper Co. v. United States, 368 U.S. 208 61
San Diego Building Trades Council v. Garmon, 353 U.S. 26 152, 897
San Juan Star Co., In re, 662 F. 2d 108 29
Santa Clara v. Andrus, 572 F. 2d 660 406
Santobello v. New York, 404 U.S. 257 60, 508–511
Santosky v. Kramer, 455 U.S. 745 263, 265, 306, 308, 460

Page
Schantz v. White Lightning, 231 N. W. 2d 812 156, 157, 164
Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 949, 950, 953, 954, 957, 959–964, 966–969, 975, 978, 979, 981–983, 985
Schenley Corp. v. United States, 326 U.S. 432 786
Scheuer v. Rhodes, 416 U.S. 232 920
Schilling v. Rogers, 363 U.S. 666 349
Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 763, 781
Schlesinger v. Reservists To Stop the War, 418 U.S. 208 955
Schmerber v. California, 384 U.S. 757 666–668, 670, 671
Schneckloth v. Bustamonte, 412 U.S. 218 196, 446
Schneider v. State, 308 U.S. 147 964, 965
Schonfeld v. Penza, 477 F. 2d 899 535
Schweiker v. Gray Panthers, 453 U.S. 34 119, 834, 844
Schweiker v. Hansen, 450 U.S. 785 60, 62, 64, 67
Schwimmer v. Sony Corp. of America, 677 F. 2d 946 769
Scott v. City of Niagara Falls, 95 N. Y. Misc. 2d 353 922
Seaboard Air Line R. Co. v. United States, 261 U.S. 299 11
Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71 770, 773
SEC v. Chenery Corp., 332 U.S. 194 60
SEC v. ESM Government Services, Inc., 645 F. 2d 310 748
SEC v. Sloan, 436 U.S. 103 843, 865
Sellers v. United States, 89 S. Ct. 36 292
Shaffer v. Heitner, 433 U.S. 186 829
Shapiro v. Thompson, 394 U.S. 618 291

Page

Sharpe v. Harris, 621 F. 2d 530 126, 129
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 469
Shelton v. United States, 246 F. 2d 571 509
Sheppard v. Maxwell, 384 U.S. 333 33
Shuttlesworth v. City of Birmingham, 394 U.S. 147 307
Silverthorne Lumber Co. v. United States, 251 U.S. 385 441, 442, 458, 688
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 955
Singleton v. Wulff, 428 U.S. 106 954, 955
Skidmore v. Swift & Co., 323 U.S. 134 865
Smith v. Allwright, 321 U.S. 649 212
Smith v. Goguen, 415 U.S. 566 965
Smith v. Phillips, 455 U.S. 209 1038, 1047
Sniadach v. Family Finance Corp., 395 U.S. 337 827, 965
Snyder v. Massachusetts, 372 U.S. 335 1266, 1267
Social Security Bd. v. Nierotko, 327 U.S. 358 843
Sony Corp. v. University City Studios, Inc., 464 U.S. 417 710
South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177 92
Southern Motor Carriers Rate Conference, Inc. v. United States, 676 F. 2d 1374 359, 360
Southern Pacific Co. v. Arizona, 325 U.S. 761 88, 92
Southern R. Co. v. Seaboard Allied Mining Corp., 442 U.S. 444 345, 349, 350
Southern S.S. Co. v. NLRB, 316 U.S. 31 903
Spano v. New York, 360 U.S. 315 194, 453, 454
Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 648

Page

Spencer v. Zant, 715 F. 2d 1562 1221, 1222
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 88, 90
Spring v. Constantino, 168 Conn. 563 922
Sprowal v. Hendrick, 438 Pa. 435 268
Stack v. Boyle, 342 U.S. 1 289, 297
Stafford v. Briggs, 444 U.S 527 828
Standard Oil Co. v. Johnson, 316 U.S. 481 152, 153
Standard Oil Co. v. United States, 221 U.S. 1 761, 785, 790
Standard Oil Division v. Starks, 528 F. 2d 201 519
Standard Pressed Steel Co. v. Washington Revenue Dept., 419 U.S. 560 648
Stark v. Wickard, 321 U.S. 288 348, 351, 352
State. See also name of State.
State v. Ege, 274 N. W. 2d 350 439
State v. Gleason, 404 A. 2d 573 265, 268
State v. Kottenbroch, 319 N. W. 2d 465 155
State v. Logan, 60 Ohio St. 2d 126 496
State v. Sheppard, 182 Conn. 412 49
State v. Williams, 182 N. W. 2d 396 437
State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 712
State ex rel. Donahey v. Edmondson, 89 Ohio St. 93 497
State of Maine Dept. of Transportation v. ICC, 587 F. 2d 541 635
State Tax Comm'n v. Van Cott, 306 U.S. 511 152
Staub v. City of Baxley, 355 U.S. 313 307
Steelworkers v. Sadlowski, 457 U.S. 102 537, 542, 553, 554, 556

Page
Steelworkers v. Weber, 443 U.S. 193 587, 589, 611
Stevens & Co. v. NLRB, 461 U.S. 490 894
Stewart v. Gorter, 70 Md. 242 242
Stone v. Powell, 428 U.S. 465 450, 455, 456
Stovall v. Denno, 388 U.S. 293 456
Strickland v. Washington, 466 U.S. 668 453
Stromberg v. California, 283 U.S. 359 965
Sugarman v. Dougall, 413 U.S. 634 220–222, 228
Sullivan v. Wainwright, 464 U.S. 109 1222
Sumner v. Mata, 449 U.S. 539 280
Sumner v. Mata, 455 U.S. 591 677
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 773
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 570, 586
Supervisors v. Stanley, 105 U.S. 305 976
Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 874
Sutton v. United States, 256 U.S. 575 62, 64
Swain v. Alabama, 380 U.S. 202 1262–1264
Sweet v. Rechel, 159 U.S. 380 10
Sweezey v. Arc Electrical Construction Co., 295 N. Y. 306 933
Swift & Co. v. Wickham, 382 U.S. 111 212
Switchmen v. National Mediation Bd., 320 U.S. 297 347, 349
Taggart v. Mandel, 391 F. Supp. 733 219
Tang v. Ping, 209 N. W. 2d 624 155
Taylor v. Louisiana, 419 U.S. 522 1262
Teamsters v. United States, 431 U.S. 324 577, 578, 581, 582, 587, 588, 612, 614–617, 621, 876, 902
Tehan v. United States ex rel. Shott, 382 U.S. 406 456

Page
Teitel Film Corp. v. Cusack, 390 U.S. 139 965
Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 709
TVA v. Hill, 437 U.S. 153 866
TVA v. Welch, 327 U.S. 546 240
Tenney v. Brandhove, 341 U.S. 367 920
Territory. See name of Territory.
Terry v. Ohio, 392 U.S. 1 264, 456
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 875
Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F. 2d 843 728, 732
Thomas v. George Hyman Construction Co., 173 F. Supp. 381 933, 937
Thompson v. Consolidated Gas Corp., 300 U.S. 55 241
Thompson v. Louisville, 362 U.S. 199 292
Thompson v. Sawyer, 219 U.S. App. D. C. 393 613
Thomson v. Gaskill, 315 U.S. 442 73
Thornhill v. Alabama, 310 U.S. 88 964
Tileston v. Ullman, 318 U.S. 44 955
Timken Roller Bearing Co. v. United States, 341 U.S. 593 764, 765, 782, 786
Tollett v. Henderson, 411 U.S. 258 508, 510
Tose v. First Pennsylvania Bank, N. A., 648 F. 2d 879 769
Townsend v. Sain, 372 U.S. 293 507, 1031
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 843–845
Trans Alaska Pipeline Rate Cases, 436 U.S. 631 355, 365, 366, 372, 373
Trbovich v. Mine Workers, 404 U.S. 528 539, 540, 549, 550, 559, 560

Page

Trico Products Corp. v. NLRB, 489 F. 2d 347 902
Trust Fund Service v. Aro Glass Co., 89 Wash. 2d 758 30
Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 710
Udall v. Tallman, 380 U.S. 1 390, 843
Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143 389, 843, 844
Union Electric Co. v. EPA, 427 U.S. 246 844
Union Pacific Coal Co. v. United States, 173 F. 737 786
Uniservices, Inc., In re, 517 F. 2d 492 1002
United Air Lines, Inc. v. Mahin, 410 U.S. 623 152, 157
United Air Lines, Inc. v. Mahin, 54 Ill. 2d 431 158
United Building and Construction Trades Council v. Mayor of Camden, 465 U.S. 208 95
United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 359
United States v. Agurs, 427 U.S. 97 480, 485, 488, 489, 511
United States v. American Tobacco Co., 221 U.S. 106 761
United States v. Ammar, 714 F. 2d 238 1265
United States v. Apker, 705 F. 2d 293 440
United States v. Armour & Co., 402 U.S. 673 574
United States v. Arthur Young & Co., 465 U.S. 805 751
United States v. Ash, 413 U.S. 300 189, 196, 446, 447, 672
United States v. Augenblick, 393 U.S. 348 491
United States v. Bienvenue, 632 F. 2d 910 440
United States v. Bisceglia, 420 U.S. 141 751
United States v. Blevins, 593 F. 2d 646 190
United States v. Bodcaw Co., 440 U.S. 202 6

Page

United States v. Borden Co., 308 U.S. 188 1017
United States v. Bowdach, 561 F. 2d 1160 279
United States v. Bridell, 180 F. Supp. 268 786
United States v. Brookins, 614 F. 2d 1037 440
United States v. Bryant, 142 U.S. App. D. C. 132 484
United States v. Burr, 25 F. Cas. 49 1038
United States v. Calandra, 414 U.S. 338 456
United States v. California, 332 U.S. 19 63
United States v. Candelaria, 271 U.S. 432 148
United States v. Causby, 328 U.S. 256 1016
United States v. Ceccolini, 435 U.S. 268 445
United States v. Chesapeake & Ohio R. Co., 426 U.S. 500 365, 372, 373
United States v. Childress, 715 F. 2d 1313 1264
United States v. Citizens & Southern National Bank, 422 U.S. 86 783
United States v. City of Alexandria, 614 F. 2d 1358 613
United States v. City of Chicago, 663 F. 2d 1354 613
United States v. Clardy, 540 F. 2d 439 190
United States v. Clark, 445 U.S. 23 515
United States v. Clarke, 445 U.S. 253 5
United States v. Colgate & Co., 250 U.S. 300 94, 776, 789, 790, 796
United States v. Columbia Steel Co., 334 U.S. 495 792
United States v. Commodities Trading Corp., 339 U.S. 121 10
United States v. Consolidated Coal Co., 424 F. Supp. 577 786
United States v. Crescent Amusement Co., 323 U.S. 173 762, 763, 780, 781, 793

Page
United States v. Crews, 445 U.S. 463 444, 688
United States v. Cronic, 466 U.S. 648 453, 457, 510
United States v. Daniels, 698 F. 2d 221 190
United States v. Darusmont, 449 U.S. 292 731, 732
United States v. Davis, 710 F. 2d 104 278
United States v. Dickinson, 331 U.S. 745 5
United States v. Dionisio, 410 U.S. 1 666
United States v. Doe, 465 U.S. 605 742
United States v. Dow, 357 U.S. 17 5
United States v. Duncan, 598 F. 2d 839 1038
United States v. Edwards, 430 A. 2d 1321 295
United States v. E. I du Pont de Nemours & Co., 351 U.S. 377 789
United States v. Erika, Inc., 456 U.S. 201 347
United States v. 15.65 Acres of Land, 689 F. 2d 1329 9, 13
United States v. 59.29 Acres of Land, 495 F. Supp. 212 9
United States v. Fisher, 700 F. 2d 780 440
United States v. 564.54 Acres of Land, 441 U.S. 506 10
United States v. Frankfort Distilleries, Inc., 324 U.S. 293 713
United States v. General Motors Corp., 323 U.S. 373 1003, 1005
United States v. Gettysburg Electric R. Co., 160 U.S. 668 241
United States v. Goodwin, 457 U.S. 368 510
United States v. Greenman, 700 F. 2d 1377 507
United States v. Griffin, 401 F. Supp. 1222 786

Page
United States v. Griffith, 334 U.S. 100 763, 781
United States v. Grinnell Corp., 384 U.S. 563 767
United States v. Hartley, 678 F. 2d 961 786
United States v. Heldt, 215 U.S. App. D. C. 206 44
United States v. Henry, 447 U.S. 264 196, 455
United States v. Holmes, 452 F. 2d 249 44
United States v. I. B. E. W., Local No. 38, 428 F. 2d 144 613
United States v. Ironworkers Local 86, 443 F. 2d 544 613, 619
United States v. ITT Continental Baking Co., 420 U.S. 223 607
United States v. Janis, 428 U.S. 433 456
United States v. Kelley, 526 F. 2d 615 1265
United States v. Kemmel, 160 F. Supp. 718 786
United States v. Kordel, 397 U.S 1 670
United States v. LaSalle National Bank, 437 U.S. 298 748
United States v. Lee Way Motor Freight, Inc., 625 F. 2d 918 613
United States v. Lovasco, 431 U.S. 783 190, 192, 486
United States v. Lurz, 666 F. 2d 69 1265
United States v. MacDonald, 456 U.S. 1 190
United States v. Mandujano, 425 U.S. 564 188, 196
United States v. Mara, 410 U.S. 19 666
United States v. Marion, 404 U.S. 307 186, 190–192, 486
United States v. Matlock, 415 U.S. 164 444
United States v. Mendenhall, 446 U.S. 544 656
United States v. Merz, 376 U.S. 192 8

Page

United States v. Midwest Video Corp., 406 U.S. 649 700

United States v. Miller, 317 U.S. 369 10

United States v. Miller, 425 U.S. 435 743, 745

United States v. Mills, 641 F. 2d 785 184

United States v. Moore, 95 U.S. 760 844

United States v. Morrison, 429 U.S. 1 210

United States v. Morrison, 449 U.S. 361 201, 202, 456

United States v. Morton, 467 U.S. 822 844

United States v. Muniz, 374 U.S. 150 814

United States v. Munsingwear, Inc., 340 U.S. 36 584, 594

United States v. Neary, 552 F. 2d 1184 279

United States v. Offices Known as 50 State Distributing Co., 708 F. 2d 1371 44

United States v. Oliver, 505 F. 2d 301 194

United States v. 156.81 Acres of Land, 671 F. 2d 336 9

United States v. Parke, Davis & Co., 362 U.S. 29 764, 785, 790

United States v. Peacock, 654 F. 2d 339 1265

United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 60, 68

United States v. Perez, 658 F. 2d 654 1265

United States v. Powell, 379 U.S. 48 739, 742, 747–749

United States v. Public Utilities Comm'n of California, 345 U.S. 295 91

United States v. Raines, 362 U.S. 17 269, 955, 959, 976

United States v. Reading Co., 253 U.S. 26 761

United States v. Rettig, 589 F. 2d 418 44

United States v. Robinson, 414 U.S. 218 656

Page

United States v. Romero, 692 F. 2d 699 441

United States v. Roper, 681 F. 2d 1354 441

United States v. Ruzicka, 329 U.S. 287 348

United States v. Sampson, 371 U.S. 75 786

United States v. San Francisco, 310 U.S. 16 63

United States v. Schell, 692 F. 2d 672 278

United States v. Schmidt, 573 F. 2d 1057 441

United States v. Scott, 437 U.S. 82 211

United States v. Seohnlein, 423 F. 2d 1051 440

United States v. Shaw, 309 U.S. 495 518

United States v. Shimer, 367 U.S. 374 699, 700, 845, 865, 866

United States v. Southwestern Cable Co., 392 U.S. 157 699, 702

United States v. Stewart, 311 U.S. 60 62, 63

United States v. Stewart, 531 F. 2d 326 279

United States v. Swift & Co., 286 U.S. 106 583, 610

United States v. Tamura, 694 F. 2d 591 44

United States v. 329.73 Acres of Land, 704 F. 2d 800 11

United States v. Timken Roller Bearing Co., 83 F. Supp. 284 765

United States v. Toral, 636 F. 2d 893 661

United States v. Tucker, 404 U.S. 443 295

United States v. Turkette, 452 U.S. 576 791

United States v. United Shoe Machinery Corp., 391 U.S. 244 610

United States v. Utah Constr. & Mining Co., 384 U.S. 394 637

United States v. Valenzuela-Bernal, 458 U.S. 858 485, 486

Page

United States v. Wade, 388 U.S. 218 188, 189, 195, 442, 444, 445, 456, 458, 459, 666, 668, 1267

United States v. Washington, 431 U.S. 181 654

United States v. Williamson, 567 F. 2d 610 279

United States v. Wilson, 420 U.S. 332 211, 212, 214, 499

United States v. Wiltberger, 5 Wheat. 76 499

United States v. Wright, 588 F. 2d 31 1265

United States v. Yellow Cab Co., 332 U.S. 218 760–765, 779, 781, 782, 790, 792

United States ex rel. Bennett v. Rundle, 419 F. 2d 599 46, 47, 49

United States ex rel. Hall v. Hansen, 303 N. W. 2d 349 145, 156

United States ex rel. Owens v. Twomey, 508 F. 2d 858 440

United States ex rel. TVA v. Welch, 327 U.S. 546 240

U. S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 875

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 102, 789

United States Trust Co. v. New Jersey, 431 U.S. 1 243, 733

United Virginia Bank/National v. Eaves, 416 F. Supp. 518 519

University of California Regents v. Bakke, 438 U.S. 265 81, 588, 612, 620

University of Texas v. Camenisch, 451 U.S. 390 572, 585, 586, 601–604

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 728–730, 733

Utah v. United States, 284 U.S. 534 63

Utah Power & Light Co. v. United States, 243 U.S. 389 64, 66

Vance v. Bradley, 440 U.S. 93 242

Page

Vanderbilt v. Vanderbilt, 354 U.S. 416 828

Varnedare v. State, 264 Ark. 596 507

Vermillion v. Spotted Elk, 85 N. W. 2d 432 144, 145, 147, 148, 150, 160–163

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 131

Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 908

Virgin Islands v. Gereau, 502 F. 2d 914 440

Virgin Islands v. Scotland, 614 F. 2d 360 507

Volkswagenwerk v. FMC, 390 U.S. 261 843

Von Wallhoffen v. Newcombe, 10 Hun. 236 921

Wainwright v. Adams, 466 U.S. 964 1222

Walker v. City of Birmingham, 388 U.S. 307 600

Wan v. United States, 266 U.S. 1 682

Warden v. Hayden, 387 U.S. 294 653

Warth v. Seldin, 422 U.S. 490 955

Washington v. Davis, 426 U.S. 229 583

Washington v. Texas, 388 U.S. 14 486

Washington v. United States, 460 U.S. 536 647

Washington v. Yakima Indian Nation, 439 U.S. 463 143, 146, 150, 151, 161, 164, 166

Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 235 U.S. App. D. C. 1 728

Wayburn v. Schupf, 39 N. Y. 2d 682 256, 261, 264–266, 268, 273, 279, 280, 291, 296, 299

Wayne v. United States, 115 U.S. App. D. C. 234 440

Page

Weatherford v. Bursey, 429 U.S. 545 456, 669, 686
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 1001, 1006, 1012
Webster v. Luther, 163 U.S. 331 843, 844
Weinberger v. Salfi, 422 U.S. 749 110
Welch v. Henry, 305 U.S. 134 733
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 88, 242, 1015
Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n, 555 F. 2d 82 1008
Whalen v. Roe, 429 U.S. 589 35
Whalen v. United States, 445 U.S. 684 158, 269, 489
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 91, 93–97, 99, 103
White v. Mathews, 559 F. 2d 852 116, 120, 126, 127
White v. Mathews, 434 F. Supp. 1252 129
White Eagle v. Dorgan, 209 N. W. 2d 621 144
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 147
Whiteshield, In re, 124 N. W. 2d 694 144, 145
Whiting v. Hoffine, 294 N. W. 2d 921 148
Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547
Wilber National Bank v. United States, 294 U.S. 120 59, 63
Williams v. Brewer, 375 F. Supp. 170 437
Williams v. Illinois, 399 U.S. 235 291
Williams v. Illinois, 466 U.S. 981 1262
Williams v. Illinois, 467 U.S. 1268 1264

Page

Williams v. Lee, 358 U.S. 217 140, 142, 147, 148, 156, 160, 161, 163
Williams v. Norris, 12 Wheat. 117 842
William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F. 2d 1014 783
Williamson v. Lee Optical Co., 348 U.S. 483 979
Wilson v. Iseminger, 185 U.S. 55 242
Windsor v. Gibson, 424 So. 2d 888 922
Winship, In re, 397 U.S. 358 259, 263, 275, 282, 291, 315
Wirtz v. Glass Bottle Blowers Assn., 389 U.S. 463 536, 539, 541, 542, 549
Wirtz v. Hotel Employees, 391 U.S. 492 549, 553
Wirtz v. Laborers, 389 U.S. 477 536, 539, 549
Wisconsin v. Constantineau, 400 U.S. 433 237, 712
Wolf, Ex parte, 116 Tex. Crim. 127 225
Wolff v. McDonnell, 418 U.S. 539 185
Wong Sun v. United States, 371 U.S. 471 441, 442, 459, 671, 688, 689
Wood v. Strickland, 420 U.S. 308 920
Woodby v. INS, 385 U.S. 276 424
Woodson v. North Carolina, 428 U.S. 280 1267
Worcester v. Georgia, 6 Pet. 515 142, 147
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 829
W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 588, 597, 600, 605, 606
Wright v. Califano, 587 F. 2d 345 127
Wyoming v. Colorado, 259 U.S. 419 319, 327, 329, 339
Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 U.S. 217 976

Page

Yearsley v. Ross Construction Co., 309 U.S. 18 1017

Youakim v. Miller, 425 U.S. 231 697

Younger v. Harris, 401 U.S. 37 236-238, 923, 973, 976

Zablocki v. Redhail, 434 U.S. 374 307

Zamora v. INS, 534 F. 2d 1055 419, 420

Zemel v. Rusk, 381 U.S. 1 32

Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866 36

Zenith Radio Corp. v. United States, 437 U.S. 443 843

Ziffrin, Inc. v. Reeves, 308 U.S. 132 712

Zuber v. Allen, 396 U.S. 168 341, 352

Zwickler v. Koota, 389 U.S. 241 237, 966

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1983

KIRBY FOREST INDUSTRIES, INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-1994. Argued February 22, 1984—Decided May 21, 1984

Petitioner manufacturer of forest products owns substantial timberland in Texas. On August 21, 1978, after negotiations to acquire over 2,000 acres of this land for a national preserve had broken down, the United States filed a "straight-condemnation" complaint under 40 U. S. C. § 257. Shortly thereafter, the United States filed a notice of *lis pendens*, notifying the public of the institution of the proceeding. The District Court referred the matter to a special commission to ascertain the compensation due petitioner. Trial before the commission began on March 6, 1979, and after hearing competing testimony as to the fair market value of the land, the commission entered a report recommending compensation in the amount of $2,331,202. The District Court entered judgment awarding petitioner compensation for that amount, plus 6% interest for the period from the date the complaint was filed to the date the Government deposited the adjudicated value of the land with the court. On March 26, 1982, the United States deposited the amount of the judgment in the District Court's registry, and, on that same date, acquired title to the land. The Court of Appeals reversed the award of interest to petitioner, holding that the date of the taking should be deemed the date on which the compensation award was paid and that hence no interest was due on that award. The court also ruled that the commission inadequately explained its valuation of the land, and accordingly remanded the case to the District Court for further findings regarding the value.

Held:

1. The taking of petitioner's land occurred on March 26, 1982, and because the award was paid on that date, no interest was due thereon. Pp. 9–16.

(a) That the date of taking in "straight-condemnation" proceedings must be deemed the date on which the United States tenders payment to the landowner is amply supported by this Court's prior decisions and by indications of congressional intent derived from the structure of the pertinent statutory scheme and Federal Rule of Civil Procedure 71A. Rule 71A(i) permits the United States to dismiss a condemnation suit at any time before compensation has been determined and paid, unless the United States has previously acquired title or taken possession. The Government's capacity in this fashion to withdraw from the proceeding would be difficult to explain if a taking were effectuated prior to tendering of payment. And the option given to the Government in 40 U. S. C. § 258a of peremptorily appropriating land prior to final judgment would have been superfluous if a taking occurred upon the filing of a complaint in a § 257 suit. Pp. 11–13.

(b) Prior to payment of the condemnation award in this case, there was no interference with petitioner's property interests severe enough to give rise to a taking entitling petitioner to just compensation under the Fifth Amendment. Until title passed to the United States, petitioner was free to make whatever use of its property it pleased. The Government never forbade petitioner to cut trees on the land or develop it in some other way. Nor did the Government abridge petitioner's right to sell the land. While the initiation of condemnation proceedings, publicized by the *lis pendens* notice, may have reduced the selling price of the land, impairment of the market value of property incident to otherwise legitimate governmental action ordinarily does not result in a taking, and did not do so here. Pp. 13–16.

2. Petitioner's constitutional entitlement to the value of its land on the date of the taking can be accommodated by allowing petitioner, on remand, to present evidence pertaining to change in the market value of the property during the substantial delay between the date of valuation and the date the Government tendered payment. Other condemnees who find themselves in petitioner's position may avail themselves of Federal Rule of Civil Procedure 60(b), which empowers a district court, upon motion of a party, to withdraw or amend a final judgment for "any . . . reason justifying relief from the operation of the judgment." Pp. 16–19.

696 F. 2d 351, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Joe G. Roady argued the cause and filed briefs for petitioner.

Harriet S. Shapiro argued the cause for the United States. With her on the brief were *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Assistant Attorney General Liotta, Raymond N. Zagone,* and *Jacques B. Gelin.**

JUSTICE MARSHALL delivered the opinion of the Court.

Title 40 U. S. C. § 257, in conjunction with Rule 71A of the Federal Rules of Civil Procedure, prescribes a procedure pursuant to which the United States may appropriate privately owned land by eminent domain. The central issue in this case is whether the manner in which the value of the land is determined and paid to its owner under that procedure comports with the requirement, embodied in the Fifth Amendment, that private property not be taken for public use without just compensation.

I

A

The United States customarily employs one of three methods when it appropriates private land for a public purpose. The most frequently used is the so-called "straight-condemnation" procedure prescribed in 40 U. S. C. § 257. Under that statute, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses"[1] makes an application to the Attorney General who, within 30 days, must initiate condemnation proceedings. The form of those proceedings is governed by Federal Rule of Civil Procedure 71A.[2] In brief, Rule 71A requires the filing in federal district court of a "complaint in condemnation," identifying the property and the interest therein that the United States wishes to take, followed by a trial—before a jury, judge, or specially appointed commission—of the question of how much compensation is due the owner of the land. The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. *Danforth* v. *United States*, 308 U. S. 271, 284 (1939). If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States. If the Government decides not to exercise its option, it can move for dismissal of the condemnation action. *Ibid.;* see Fed. Rule Civ. Proc. 71A(i)(3).

**Jerrold A. Fadem* and *Michael M. Berger* filed a brief for Laughlin Recreational Enterprises, Inc., as *amicus curiae* urging reversal.

[1] Such authorization generally is derived from some independent statute that vests the officer with the power of eminent domain but does not prescribe the manner in which that power should be exercised. See, *e. g.*, 16 U. S. C. § 404c–11.

A more expeditious procedure is prescribed by 40 U. S. C. § 258a.[3] That statute empowers the Government, "at any time before judgment" in a condemnation suit, to file "a declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States." The Government is obliged, at the time of the filing, to deposit in the court, "to the use of the persons entitled thereto," an amount of money equal to the estimated value of the land.[4] Title and right to possession thereupon vest immediately in the United States. In subsequent judicial proceedings, the exact value of the land (on the date the declaration of taking was filed) is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference.

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[2] Suits under § 257 originally were required to "conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State" in which the suits were instituted. Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357. The adoption in 1951 of Rule 71A capped an effort to establish a uniform set of procedures governing all federal condemnation actions. See Advisory Committee's Notes on Rule 71A, Original Report, 28 U. S. C. App., p. 644.

[3] Section 258a was enacted in 1931, for the principal purpose of enabling the United States, when it wished, peremptorily to appropriate property on which public buildings were to be constructed, making it possible for the Government to begin improving the land, thereby stimulating employment during the Great Depression. See H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930).

Finally, Congress occasionally exercises the power of eminent domain directly. For example, when Congress thinks that a tract of land that it wishes to preserve inviolate is threatened with imminent alteration, it sometimes enacts a statute appropriating the property immediately by "legislative taking" and setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners.[5]

In addition to these three statutory methods, the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner. *E. g.*, *United States* v. *Dickinson*, 331 U. S. 745, 747–749 (1947). In such a case, the owner has a right to bring an "inverse condemnation" suit to recover the value of the land on the date of the intrusion by the Government. *United States* v. *Dow*, 357 U. S. 17, 21–22 (1958).[6]

The Government's selection amongst and implementation of these various methods of acquiring property is governed, to some extent, by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. § 4601 *et seq.* That statute enjoins federal agencies, *inter alia,* to attempt to acquire property by negotiation rather than condemnation, and whenever possible not to take land by physical appropriation. §§ 4651(1), (4), (8). In addition, the statute requires a court with jurisdiction over a condemnation action that is dismissed or abandoned by the Government to award the landowner an amount that will reimburse him for "his reasonable costs, disbursements, and expenses" incurred in contesting the suit. § 4654(a).[7] The statute does not, however, regulate decisions by the Government whether to employ the "straight-condemnation" procedure prescribed in § 257 or the "declaration of taking" procedure embodied in § 258a.

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[4] The owner is entitled to prompt distribution of the deposited funds. 40 U. S. C. § 258a; Fed. Rule Civ. Proc. 71A(j).

[5] See, *e. g.*, 16 U. S. C. § 79c(b) (vesting in the United States "all right, title, and interest" in the land encompassed by the Redwood National Park as of the date of the enactment of the statute).

[6] Such a suit is "inverse" because it is brought by the affected owner, not by the condemnor. *United States* v. *Clarke*, 445 U. S. 253, 257 (1980). The owner's right to bring such a suit derives from "'the self-executing character of the constitutional provision with respect to condemnation. . . .'" *Ibid.* (quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)).

B

Petitioner, a manufacturer of forest products, owns substantial tracts of timberland in Texas. This case arises out of a protracted effort by the United States to appropriate 2,175.86 acres of that land.

In the mid-1960's, several studies were made of the desirability of establishing a national park or preserve to protect an area of relatively untrammeled wilderness in eastern Texas. One of those studies, conducted in 1967 by the National Park Service, recommended the creation of a 35,500-acre Big Thicket National Park. The Texas Forestry Association, of which petitioner is a member, endorsed that proposal and declared a voluntary moratorium on logging in the designated area. Since 1967, petitioner has observed that moratorium and has not cut any trees on its property lying within the area demarked by the Park Service.[8]

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[7] We have held that the last-mentioned provision for the reimbursement of costs is a matter of legislative grace, not constitutional entitlement. *United States* v. *Bodcaw Co.*, 440 U. S. 202, 204 (1979) *(per curiam).*

[8] Testimony at trial by one of petitioner's officers suggested that, regardless of the existence of the moratorium, petitioner would not have cut

After seven years of desultory consideration of the matter, Congress rejected the Park Service proposal and enacted legislation creating a much larger Big Thicket National Preserve. Act of Oct. 11, 1974, Pub. L. 93–439, 88 Stat. 1254, 16 U. S. C. § 698 *et seq*. The statute directed the Secretary of the Interior to acquire the land within the boundaries of the Preserve. 16 U. S. C. § 698(c). The Senate Report made clear that, though the Secretary had the authority to acquire individual tracts by declaration of taking, pursuant to 40 U. S. C. § 258a, such a peremptory procedure should be employed only when necessary to protect a parcel from destruction. S. Rep. No. 93–875, p. 5 (1974). It was understood that, in the absence of such an emergency, the Secretary would purchase the land using the straight-condemnation method prescribed in 40 U. S. C. § 257.[9]

The Government initially attempted to acquire the acreage owned by petitioner through a negotiated purchase. On August 21, 1978, after those negotiations had broken down, the United States filed a complaint in condemnation in the District Court for the Eastern District of Texas. Shortly thereafter, the Government filed a notice of *lis pendens*, notifying the public of the institution of the condemnation proceeding. The District Court referred the matter to a special commission to ascertain the compensation due petitioner.

Trial before the commission began on March 6, 1979. On that day, the parties stipulated that "today is the date of taking." After hearing competing testimony pertaining to the fair market value of petitioner's land, the commission

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any trees on that land, which it had held as a "reserve logging area" since the 1950's. Brief for United States 8, citing 1 Tr. 52. For the purpose of our decision, we place no weight on that testimony; we assume that petitioner voluntarily forwent an opportunity to make profitable use of its land.

[9] The House bill had contained a provision appropriating the land by a legislative taking. H. R. 11546, 93d Cong., 1st Sess., § 2 (1973). The Senate rejected this method on the ground that it was unnecessary to protect the land and would be unduly expensive. S. Rep. No. 93–875, pp. 5–6 (1974). The House acceded to the Senate's position.

entered a report recommending compensation in the amount of $2,331,202.

Both parties filed objections to the report in the District Court. On August 13, 1981, after holding a hearing to consider those objections, the District Court entered judgment awarding petitioner compensation in the amount recommended by the commission, plus interest at a rate of six percent for the period from August 21, 1978 (the date the complaint had been filed), to the date the Government deposited the adjudicated value of the land with the court. *United States* v. *2,175.86 Acres of Land*, 520 F. Supp. 75, 81 (1981). The court justified its award of interest on the ground that the institution of condemnation proceedings had "effectively denied [petitioner] economically viable use and enjoyment of its property" and therefore had constituted a taking. *Id.*, at 80.[10] On March 26, 1982, the United States deposited the total amount of the judgment in the registry of the District Court. On the same date, the Government acquired title to the land.

Both parties appealed. A panel of the Court of Appeals for the Fifth Circuit unanimously ruled that the commission's report failed to meet the standards enunciated in *United States* v. *Merz*, 376 U. S. 192 (1964), and remanded the case for further findings regarding the value of petitioner's land. *United States* v. *2,175.86 Acres of Land*, 696 F. 2d 351, 358 (1983). More importantly for present purposes, the Court of Appeals, by a vote of two to one, reversed the District Court's award of interest to petitioner. Reasoning that "the mere commencement of straight condemnation proceedings, where the government does not enter into possession . . . , does not constitute a taking," *id.*, at 355, the court held that, in this case, the date of the taking should be deemed the date on which the compensation award was paid.[11] Consequently, no interest was due on that award.[12]

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[10] The District Court did not expressly rule upon petitioner's contention that the stipulation entered into by the parties on the opening day of trial established the date of the taking. But, by awarding interest as of the date of the filing of the complaint, the court implicitly rejected petitioner's submission on that issue.

We granted certiorari to resolve a conflict in the Circuits regarding the date on which the taking, in a "straight-condemnation" proceeding, should be deemed to occur and the constitutional obligation of the United States to pay interest on the adjudicated value of the property.[13] 464 U. S. 913 (1983). We now affirm.

II

The United States has the authority to take private property for public use by eminent domain, *Kohl* v. *United States*, 91 U. S. 367, 371 (1876), but is obliged by the Fifth Amendment to provide "just compensation" to the owner thereof.

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[11] The Court of Appeals agreed with the District Court that the parties' stipulation regarding the "date of taking" was not controlling, see n. 10, *supra*. After reviewing the record, the Court of Appeals determined that the stipulation pertained only to the date as of which the land was to be valued, not the date on which the Government was deemed to have appropriated the land. 696 F. 2d, at 356. We see no reason to question that determination.

[12] Judge Jolly dissented on this issue, arguing that the owner of unimproved land subject to condemnation proceedings under 40 U. S. C. § 257 is entitled to interest on the award at least for the period beginning with entry of judgment by the district court, because during that period the owner is "shackled from making economically viable use of his property." 696 F. 2d, at 358–359.

[13] In two cases, panels of the Court of Appeals for the Ninth Circuit have rejected the position taken by the Fifth Circuit in this case, holding that, when the United States condemns unimproved property using the method prescribed in 40 U. S. C. § 257, it must award interest to the owner for some period prior to the date the award is paid and title passes. *United States* v. *15.65 Acres of Land*, 689 F. 2d 1329 (1982), cert. denied *sub nom. Marin Ridgeland Co.* v. *United States*, 460 U. S. 1041 (1983); *United States* v. *156.81 Acres of Land*, 671 F. 2d 336, cert. denied, 459 U. S. 1086 (1982). Similar confusion exists in the District Courts. See, *e. g.*, *United States* v. *59.29 Acres of Land*, 495 F. Supp. 212 (ED Tex. 1980) (date of taking is date of announcement of the award by the commission).

"Just compensation," we have held, means in most cases the fair market value of the property on the date it is appropriated. *United States* v. *564.54 Acres of Land*, 441 U. S. 506, 511–513 (1979).[14] "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." *Id.*, at 511 (quoting *United States* v. *Miller*, 317 U. S. 369, 374 (1943)).[15]

If the Government pays the owner before or at the time the property is taken, no interest is due on the award. See *Danforth* v. *United States*, 308 U. S., at 284. Such a mode of compensation is not constitutionally mandated; the Fifth Amendment does not forbid the Government to take land and pay for it later. *Sweet* v. *Rechel*, 159 U. S. 380, 400–403 (1895). But if disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.

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[14] Other measures of "just compensation" are employed only "when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public. . . ." *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950).

[15] We have acknowledged that, in some cases, this standard fails fully to indemnify the owner for his loss. Particularly when property has some special value to its owner because of its adaptability to his particular use, the fair-market-value measure does not make the owner whole. *United States* v. *564.54 Acres of Land*, 441 U. S. 506, 511–512 (1979). We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of "just compensation." *Ibid.*

None of the discussion in this opinion is intended to modify either the manner in which the fair-market-value standard is interpreted and applied or the test for determining when the fair-market-value standard must be supplanted by other formulae, see n. 14, *supra*. In particular, we express no view on the question of how the value of land condemned under 40 U. S. C. § 257 should be assessed when activities of the Government during the pendency of the condemnation proceedings have so altered the condition of the property as to reduce the price it could fetch on the open market on the date of the taking.

Phelps v. *United States*, 274 U. S. 341, 344 (1927); *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 306 (1923).[16]

From the foregoing it should be apparent that identification of the time a taking of a tract of land occurs is crucial to determination of the amount of compensation to which the owner is constitutionally entitled. The Government contends that, in straight-condemnation proceedings like that at issue here, the date of taking must be deemed the date the United States tenders payment to the owner of the land. The Government's position is amply supported by prior decisions by this Court and by indications of congressional intent derivable from the structure of the pertinent statutory scheme and the governing procedural rule.

In *Danforth* v. *United States*, *supra*, we were called upon to determine the date on which the Government, in an exercise of its eminent domain power under the Flood Control Act of 1928, ch. 569, 45 Stat. 534, as amended, 33 U. S. C. § 702a *et seq.*, appropriated the petitioner's property. We held that, "[u]nless a taking has occurred previously in actuality or by a statutory provision . . . , we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." 308 U. S., at 284.[17] In response to the contention that such a procedure was unfair, we observed, "'[t]he owner is protected by the rule that title does not pass until compensation has been ascertained and paid . . . .'" *Id.*, at 284–285 (quoting *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587 (1923)).

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[16] The last-mentioned principle underlies the provision in 40 U. S. C. § 258a for the payment of interest on any difference between the estimated value of land appropriated through a declaration of taking and its subsequently adjudicated actual value as of that date. See *supra*, at 5. The principle also underlies several decisions by Courts of Appeals, holding that the six percent rate of interest prescribed by § 258a is not a ceiling on the amount that can and must be paid by the Government. See, *e. g.*, *United States* v. *329.73 Acres of Land*, 704 F. 2d 800, 812, and n. 18 (CA5 1983) (en banc). The United States has acquiesced in those decisions. Brief for United States 14, n. 13.

[17] Petitioner's contention that our decision in *Danforth* pertained only to takings effected pursuant to the Flood Control Act is unpersuasive. Though the Flood Control Act contained a provision (analogous to 40 U. S. C. § 258a) empowering the United States to appropriate land expeditiously by filing a special petition and depositing an estimated award,

That all straight-condemnation proceedings under § 257 should operate in the fashion described in *Danforth* is strongly suggested by the structure of Rule 71A, which now governs the administration of the statute. Rule 71A(i) permits the United States to dismiss a condemnation suit at any time before "compensation has been determined and paid," unless the Government previously has "acquired the title or a lesser interest . . . or taken possession."[18] The Government's capacity to withdraw from the proceeding in this fashion would be difficult to explain if a taking were effectuated prior to tendering of payment.

Finally, Congress' understanding that a taking does not occur until the termination of condemnation proceedings brought under § 257 is reflected in its adoption of § 258a for the purpose of affording the Government the option of peremptorily appropriating land prior to final judgment, thereby permitting immediate occupancy and improvement of the property.[19] Such an option would have been superfluous if, as

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ch. 569, § 4, 45 Stat. 536 (incorporating by reference § 5 of the River and Harbor Act of 1918, ch. 155, 40 Stat. 911), when the Government appropriated the land at issue in *Danforth*, it apparently did not invoke its special statutory authority but instead took the property in the usual fashion as authorized by 40 U. S. C. § 257. The holding of the case is thus on point.

[18] After commencement of the valuation hearing, the Government may dismiss the suit only pursuant to a stipulation with the owner, Fed. Rule Civ. Proc. 71A(i)(2), or with the approval of the district court, Fed. Rule Civ. Proc. 71A(i)(3). The Rule does not suggest that a court order dismissing a suit has the effect of nullifying a taking that has already occurred. Indeed, to the contrary, the Rule forbids the district court to dismiss an action (without awarding just compensation) if the Government has acquired any "interest" in the property. *Ibid.*

[19] See n. 3, *supra*.

petitioner contends, a taking occurred upon the filing of the complaint in a § 257 suit.[20]

Petitioner's principal objection to the position advocated by the Government is that such a reading of § 257 and Rule 71A is precluded by the Fifth Amendment. Petitioner contends that, at least when the subject of a straight-condemnation proceeding is unimproved land, the owner is effectively deprived of all of the significant interests associated with ownership long before the Government tenders payment. The filing of a complaint in condemnation and a notice of *lis pendens*, petitioner contends, has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party. At the same time, the owner remains liable for property taxes.[21] Such a thoroughgoing abrogation of the owner's rights, petitioner submits, surely constitutes a taking as soon as the abrogation is effective, regardless of when the land is officially appropriated under the terms of the statute.

If petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, we would find its constitutional argument compelling. We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived "an owner [of] economically viable use of his land." *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). And we have suggested that, under some circumstances, a land-use regulation that severely interfered with an owner's "distinct investment-backed expectations" might precipitate a taking. *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978). The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of "'the advantage of living and doing business in a civilized community,'"[22] some are so substantial and unforseeable, and can so easily be identified and redistributed, that "justice and fairness" require that they be borne by the public as a whole.[23] These considerations are as applicable to the problem of determining *when* in a condemnation proceeding the taking occurs as they are to the problem of ascertaining *whether* a taking has been effected by a putative exercise of the police power.

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[20] It must be admitted that the adoption of § 258a does not compel the conclusion that Congress in 1931 understood that the taking in a § 257 suit did not occur until the date payment was tendered by the condemnor, because § 258a by its terms only empowers the Government to file a declaration of taking prior to "judgment." The language of § 258a is thus consistent with a congressional understanding that the taking occurred upon entry of final judgment in a straight-condemnation action. However, the fact that Congress did not empower the Government to file a declaration of taking anytime prior to the tender of payment does not undercut our construction of §257, because the Government has no need of special authority to appropriate land after judgment and before payment in a straight-condemnation suit; after entry of judgment, the Government can acquire the land merely by paying the owner the adjudicated value of the property.

[21] Cf. *United States* v. *15.65 Acres of Land*, 689 F. 2d, at 1334 (arguing that the initiation of a condemnation action leaves "[t]he owner of unimproved land . . . with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking").

However, we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property. The Government never forbade petitioner to cut the trees on the land or to develop the tract in some other way. Indeed, petitioner is unable to point to any statutory provision that would have authorized the Government to restrict petitioner's usage of the property prior to payment of the award.[24]

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[22] *Andrus* v. *Allard*, 444 U. S. 51, 67 (1979) (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 422 (1922) (Brandeis, J., dissenting)).

[23] See *Agins* v. *Tiburon*, 447 U. S. 255, 260–262 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 123–128 (1978); *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); *Pennsylvania Coal Co.* v. *Mahon*, *supra*, at 413, 415–416; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214–1224 (1967).

Nor did the Government abridge petitioner's right to sell the land if it wished. It is certainly possible, as petitioner contends, that the initiation of condemnation proceedings, publicized by the filing of a notice of *lis pendens*, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. See, *e. g.*, *Agins* v. *Tiburon*, *supra*, at 263, n. 9; *Danforth* v. *United States*, 308 U. S., at 285; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). At least in the absence of an interference with an owner's legal right to dispose of his land,[25] even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.

It is true that any effort by petitioner to develop the land probably would have prompted the Government to exercise its authority, under 40 U. S. C. § 258a, to file a declaration of taking and thereby peremptorily to appropriate the tract in order to protect it from alteration. But the likelihood that the United States would have responded in that fashion to an attempt by petitioner to make productive use of the land weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefor as of that date, merely by informing the Government of its intention to cut down the trees.

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[24] The question of the Government's authority to dictate to petitioner the manner in which it could use the land is preeminently a question of law, not of fact. Thus, we find no merit in petitioner's contention that the Court of Appeals erred in not adhering to the strictures of Federal Rule of Civil Procedure 52(a) when examining the District Court's finding that the Government denied petitioner economically viable use of the land during the pendency of the suit.

[25] We have no occasion here to determine whether abrogation of an owner's right to sell real property, combined with a sufficiently substantial diminution of its utility to the owner, would give rise a taking. Cf. *Andrus* v. *Allard*, *supra*, at 66–68.

We conclude, in sum, that petitioner has failed to demonstrate that its interests were impaired in any constitutionally significant way before the Government tendered payment and acquired title in the usual course.[26] Accordingly, we approve the finding of the Court of Appeals that the taking of petitioner's land occurred on March 26, 1982. Because the award was paid on that date, no interest was due thereon.

III

The foregoing conclusion does not dispose of this case. We still must determine whether the award itself satisfied the strictures of the Fifth Amendment. As indicated above, petitioner is constitutionally entitled to the fair market value of its property on the date of the taking. See *supra*, at 10. Petitioner points out that $2,331,202 represents the commission's best estimate of the value of the land on March 6, 1979. To the extent that that figure is less than the value of the land on March 26, 1982, the date of the taking, petitioner contends, it has been denied just compensation.

The Government attempts to meet this objection by emphasizing the pragmatic constraints on determination of the value of real property. The Government contends that it is imperative that the trier of fact in a condemnation action be given a fixed date as of which the value of the land is to be assessed. At the time of trial, no one knows when the

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[26] Had petitioner made such a showing, complex questions would have arisen regarding the measure of "just compensation." We defer resolution of those questions to a case in which they are fairly presented.

United States will exercise its option to purchase the property, so adoption of the date of payment as the date of valuation is infeasible. Moreover, prediction of the value of land at a future time is notoriously difficult. Under these circumstances, courts and commissions understandably have adopted the convention of using the date of the commencement of the trial as the date of the valuation.

The Government's argument provides a plausible explanation for the valuation procedure used in this case and other cases, but it does not meet petitioner's constitutional claim. However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment.

We are left with the problem of prescribing a solution to this difficulty. Petitioner suggests that we mandate an award of interest, at least for the period from the date of valuation to the date of the taking, as a rough proxy for the increase in the value of the land during that period. We decline the invitation. Change in the market value of particular tracts of land over time bears only a tenuous relationship to the market rate of interest. Some parcels appreciate at rates far in excess of the interest rate; others decline in value.[27] Thus, to require the Government to pay interest on the basis proposed by petitioner would only sometimes improve the fit between the value of condemned land on the date of its appropriation and the amount paid to the owner of such land.

Solution of the problem highlighted by petitioner requires, not a rule compelling payment of interest by the Government, but rather a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially. In the case before us, such a procedure is readily available. In view of the inadequacy of the commission's explanation for its valuation of petitioner's land, the Court of Appeals remanded for reconsideration of the value of the property. On remand, the District Court can easily adduce evidence pertaining to alteration in the value of petitioner's tract between March 6, 1979, and March 26, 1982.[28] In our view, such a reassessment is both necessary and sufficient to provide petitioner just compensation.

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[27] For example, it appears that the market value of timberland of the sort owned by petitioner was much higher in March 1979 than in March 1982. See Vardaman's Green Sheet, Index of Pine Sawtimber Stumpage and Timberland Prices (Jan. 15, 1983), reprinted in App. to Brief for United States 1a.

In other cases, such an option may not be available. However, the Federal Rules of Civil Procedure contain a procedural device that could do tolerable service in this cause. Rule 60(b) empowers a federal court, upon motion of a party, to withdraw or amend a final order for "any . . . reason justifying relief from the operation of the judgment." This provision seems to us expansive enough to encompass a motion, by the owner of condemned land, to amend a condemnation award. The evidence adduced in consideration of such a motion would be very limited. The parties would not be permitted to question the adjudicated value of the tract as of the date of its original valuation; they would be limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between that date and the date on which the judgment was paid by the Government. So focused, the consideration of such a motion would be expeditious and relatively inexpensive for the parties involved.[29] Further refinement of this procedural option we leave to the courts called upon to administer it.[30]

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[28] Though the value of timberland of the kind contained in petitioner's tract seems to have declined during this period, see n. 27, *supra*, petitioner contends that the value of its parcel nevertheless increased because of the expansion of the residential areas surrounding nearby Beaumont, Tex., and the susceptibility of the parcel to rural subdivision or recreational usage. The District Court can and should assess these contentions on remand.

IV

For the reasons set forth above, we agree with the Court of Appeals that no interest was due on the condemnation award paid to petitioner. Petitioner's meritorious contention that it is constitutionally entitled to the value of its land on the date of the taking, not on the date of the valuation, can be accommodated by allowing petitioner, on remand, to present evidence pertaining to change in the market value of the tract during the period between those two dates. On the understanding that petitioner will be afforded that opportunity, the judgment is

Affirmed.

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[29] The procedure would not be free, of course, but that fact may well have a healthy effect in deterring frivolous pleas for relief from final judgments. That he would be obliged to bear some litigation costs in contesting a Rule 60(b) motion should dissuade a landowner from filing such a motion unless he had good reason to believe that the value of his property changed materially between valuation and payment.

[30] We do not mean to suggest that the constitutional difficulty discussed in this section can be solved only by affording a condemnee in petitioner's position an opportunity to file a motion to amend the judgment under Rule 60(b). Either Congress or a lower court might perceive a more easily administrable way of ensuring that the compensation paid to the owner of condemned land does not fall substantially below the fair market value of the property on the date of the taking.

SEATTLE TIMES CO., DBA THE SEATTLE TIMES, ET AL. *v.* RHINEHART ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 82-1721. Argued February 21, 1984—Decided May 21, 1984

Respondent Rhinehart is the spiritual leader of a religious group, respondent Aquarian Foundation. In recent years, petitioner newspaper companies published several stories about Rhinehart and the Foundation. A damages action for alleged defamation and invasions of privacy was brought in a Washington state court by respondents (who also include certain members of the Foundation) against petitioners (who also include the authors of the articles and their spouses). During the course of extensive discovery, respondents refused to disclose certain information, including the identity of the Foundation's donors and members. Pursuant to state discovery Rules modeled on the Federal Rules of Civil Procedure, the trial court issued an order compelling respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. However, pursuant to the State's Rule 26(c), the court also issued a protective order prohibiting petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. In seeking the protective order, respondents had submitted affidavits of several Foundation members averring that public release of the information would adversely affect Foundation membership and income and would subject its members to harassment and reprisals. By its terms, the protective order did not apply to information gained by means other than the discovery process. The Washington Supreme Court affirmed both the production order and the protective order, concluding that even if the latter order was assumed to constitute a prior restraint of free expression, the trial court had not violated its discretion in issuing the order.

Held: The protective order issued in this case does not offend the First Amendment. Pp. 29-37.

(a) In addressing the First Amendment question presented here, it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez*, 416 U. S. 396, 413. Pp. 31–32.

(b) Judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in other contexts. Rules authorizing discovery are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Furthermore, restraints placed on discovered information are not a restriction on a traditionally public source of information. Pp. 32–34.

(c) Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. Liberal pretrial discovery under the State's Rules has a significant potential for abuse. There is an opportunity for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The prevention of such abuse is sufficient justification for the authorization of protective orders. Pp. 34–36.

(d) The provision for protective orders in the Washington Rules—conferring broad discretion on the trial court—requires, in itself, no heightened First Amendment scrutiny. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders. P. 36.

(e) In this case, the trial court entered the protective order upon a showing that constituted good cause as required by Rule 26(c). Also, the order is limited to the context of pretrial civil discovery, and does not restrict dissemination if the information is obtained from other sources. It is sufficient for purposes of this Court's decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law. Pp. 36–37.

98 Wash. 2d 226, 654 P. 2d 673, affirmed.

POWELL, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 37.

Evan L. Schwab argued the cause for petitioners. With him on the briefs were *P. Cameron DeVore* and *Bruce E. H. Johnson.*

Malcolm L. Edwards argued the cause for respondents. With him on the brief was *Charles K. Wiggins.**

JUSTICE POWELL delivered the opinion of the Court.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.

I

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . . ." App. 25a. The two articles that appeared in 1979 referred to a purported connection between Rhinehart and Lou Ferrigno, star of the popular television program, "The Incredible Hulk."

**James C. Goodale, John G. Koeltl, Burt Neuborne, Charles S. Sims, W. Terry Maguire, Anthony Epstein, Erwin G. Krasnow, Bruce W. Sanford, J. Laurent Scharff, Richard M. Schmidt, Jr.*, and *Donald F. Luke* filed a brief for the American Civil Liberties Union et al. as *amici curiae.*

II

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs.[1] The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants—petitioners here—knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." *Id.*, at 8a. With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." *Id.*, at 9a. The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked . . . ." *Id.*, at 6a. The complaint requests $14,100,000 in damages for the alleged defamation and invasions of privacy.[2]

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[1] The record is unclear as to whether all five of the female plaintiffs participated in the "chorus line" described in the 1978 articles. The record also does not disclose whether any of the female plaintiffs were mentioned by name in the articles.

[2] Although the complaint does not allege specifically that the articles caused a decline in membership of the Foundation, respondents' answers to petitioners' interrogatories raised this issue. In response to petitioners'

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses.[3] Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information,[4] the identity of the Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery.[5] In their supporting memorandum, petitioners recognized that the principal issue as to discovery was respondents' "refusa[l] to permit any effective inquiry into their financial affairs, such as the source of their donations, their financial transactions, uses of

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request that respondents explain the damages they are seeking, respondents claimed that the Foundation had experienced a drop in membership in Hawaii and Washington "from about 300 people to about 150 people, and [a] concurrent drop in contributions." Record 503.

[3] Affirmative defenses included contentions that the articles were substantially true and accurate, that they were privileged under the First and Fourteenth Amendments, that the statute of limitations had run as to the 1973 articles, that the individual respondents had consented to any invasions of privacy, and that respondents had no reasonable expectation of privacy when performing before 1,100 prisoners.

[4] Rhinehart also refused to reveal the current address of his residence. He submitted an affidavit stating that he had relocated out of fear for his safety and that disclosure of his current address would subject him to risks of bodily harm. Petitioners promptly moved for an order compelling Rhinehart to give his address and the trial court granted the motion.

[5] Washington Superior Court Civil Rule 37 provides in relevant part: "A party, upon reasonable notice to other parties and all persons affected thereby, may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery . . . ."

their wealth and assets, and their financial condition in general." Record 350. Respondents opposed the motion, arguing in particular that compelled production of the identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association. Respondents also moved for a protective order preventing petitioners from disseminating any information gained through discovery. Respondents noted that petitioners had stated their intention to continue publishing articles about respondents and this litigation, and their intent to use information gained through discovery in future articles.

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. Relying on *In re Halkin*, 194 U. S. App. D. C. 257, 598 F. 2d 176 (1979),[6] the court refused to issue a protective order. It stated that the facts alleged by respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" as required by Washington Superior Court Civil Rule 26(c).[7] The court stated, however, that the denial of respondents' motion was "without prejudice to [respondents'] right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials." Record 16.

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[6] The *Halkin* decision was debated by the courts below. Prior to *Halkin*, the only Federal Court of Appeals to consider the question directly had understood that the First Amendment did not affect a trial court's authority to restrict dissemination of information produced during pretrial discovery. See *International Products Corp.* v. *Koons*, 325 F. 2d 403, 407–408 (CA2 1963). *Halkin* considered the issue at length. Characterizing a protective order as a "paradigmatic prior restraint," *Halkin* held that such orders require close scrutiny. The court also held that before a court should issue a protective order that restricts expression, it must be satisfied that "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." 194 U. S. App. D. C., at 272, 598 F. 2d, at 191 (footnotes omitted).

Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. The affidavits detailed a series of letters and telephone calls defaming the Foundation, its members, and Rhinehart—including several that threatened physical harm to those associated with the Foundation. The affiants also described incidents at the Foundation's headquarters involving attacks, threats, and assaults directed at Foundation members by anonymous individuals and groups. In general, the affidavits averred that public release of the donor lists would adversely affect Foundation membership and income and would subject its members to additional harassment and reprisals.

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[7] Rule 26(c) provides:

"Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. . . ."

Rule 26(c) is typical of the provisions adopted in many States.

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." App. 65a. The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.[8] In an accompanying opinion, the trial court recognized that the protective order would restrict petitioners' right to publish information obtained by discovery, but the court reasoned that the restriction was necessary to avoid the "chilling effect" that dissemination would have on "a party's willingness to bring his case to court." Record 63.

Respondents appealed from the trial court's production order, and petitioners appealed from the protective order.

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[8] The relevant portions of the protective order state:

"2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.

"3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes." App. 65a.

The Supreme Court of Washington affirmed both. 98 Wash. 2d 226, 654 P. 2d 673 (1982). With respect to the protective order, the court reasoned:

> "Assuming then that a protective order may fall, ostensibly, at least, within the definition of a 'prior restraint of free expression', we are convinced that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification. The need to preserve that integrity is adequate to sustain a rule like CR 26(c) which authorizes a trial court to protect the confidentiality of information given for purposes of litigation." *Id.*, at 256, 654 P. 2d, at 690.[9]

The court noted that "[t]he information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression." *Id.*, at 256–257, 654 P. 2d, at 690. Therefore, the court concluded, the trial court had not abused its discretion in issuing the protective order.[10]

The Supreme Court of Washington recognized that its holding conflicts with the holdings of the United States Court of Appeals for the District of Columbia Circuit in *In re Halkin*, 194 U. S. App. D. C. 257, 598 F. 2d 176 (1979),[11] and applies a different standard from that of the Court of Appeals for the First Circuit in *In re San Juan Star Co.*, 662 F. 2d 108 (1981).[12] We granted certiorari to resolve the conflict.[13] 464 U. S. 812 (1983). We affirm.

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[9] Although the Washington Supreme Court assumed, *arguendo*, that a protective order could be viewed as an infringement on First Amendment rights, the court also stated:

"A persuasive argument can be made that when persons are required to give information which they would otherwise be entitled to keep to themselves, in order to secure a government benefit or perform an obligation to that government, those receiving that information waive the right to use it for any purpose except those which are authorized by the agency of government which exacted the information." 98 Wash. 2d, at 239, 654 P. 2d, at 681.

[10] The Washington Supreme Court also held that, because the protective order shields respondents from "abuse of the discovery privilege," respondents could not object to the order compelling production. We do not consider here that aspect of the Washington Supreme Court's decision.

III

Most States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. F. James & G. Hazard, Civil Procedure 179 (1977).[14] Rule 26(b)(1) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Wash. Super. Ct. Civ. Rule 26(b)(1); *Trust Fund Services* v. *Aro Glass Co.*, 89 Wash. 2d 758, 763, 575 P. 2d 716, 719 (1978); cf. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2008 (1970).[15]

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[11] See n. 6, *supra*.

[12] In *San Juan Star*, the Court of Appeals for the First Circuit considered and rejected *Halkin*'s approach to the constitutionality of protective orders. Although the *San Juan* court held that protective orders may implicate First Amendment interests, the court reasoned that such interests are somewhat lessened in the civil discovery context. The court stated: "In general, then, we find the appropriate measure of such limitations in a standard of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake . . . ." 662 F. 2d, at 116.

[13] The holding of the Supreme Court of Washington is consistent with the decision of the Court of Appeals for the Second Circuit in *International Products Corp.* v. *Koons*, 325 F. 2d, at 407–408.

[14] See *Bushman* v. *New Holland Division*, 83 Wash. 2d 429, 433, 518 P. 2d 1078, 1080 (1974). The Washington Supreme Court has stated that when the language of a Washington Rule and its federal counterpart are the same, courts should look to decisions interpreting the Federal Rule for guidance. *American Discount Corp.* v. *Saratoga West, Inc.*, 81 Wash. 2d 34, 37–38, 499 P. 2d 869, 871 (1972). The Washington Rule that provides for the scope of civil discovery and the issuance of protective orders is virtually identical to its counterpart in the Federal Rules of Civil Procedure. Compare Wash. Super. Ct. Civ. Rules 26(b) and (c) with Fed. Rules Civ. Proc. 26(b) and (c).

The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.[16] If a litigant fails to comply with a request for discovery, the court may issue an order directing compliance that is enforceable by the court's contempt powers. Wash. Super. Ct. Civ. Rule 37(b).[17]

Petitioners argue that the First Amendment imposes strict limits on the availability of any judicial order that has the effect of restricting expression. They contend that civil discovery is not different from other sources of information, and that therefore the information is "protected speech" for First Amendment purposes. Petitioners assert the right in this case to disseminate any information gained through discovery. They do recognize that in limited circumstances, not thought to be present here, some information may be restrained. They submit, however:

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[15] Washington Superior Court Civil Rule 26(b)(1), identical to Federal Rule of Civil Procedure 26(b)(1) in effect at the time, provides in full:

"*In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

[16] Under Rules 30 and 31, a litigant may depose a third party by oral or written examination. The litigant can compel the third party to be deposed and to produce tangible evidence at the deposition by serving the third party with a subpoena pursuant to Rule 45. Rule 45(b)(1) authorizes a trial court to quash or modify a subpoena of tangible evidence "if it is unreasonable and oppressive." Rule 45(f) provides: "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."

[17] In addition to its contempt power, Rule 37(b)(2) authorizes a trial court to enforce an order compelling discovery by other means including, for example, regarding designated facts as established for purposes of the action. Cf. Fed. Rule Civ. Proc. 37(b)(2)(A).

> "When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression." Brief for Petitioners 10.

We think the rule urged by petitioners would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process.

IV

It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. This interest may well include most—and possibly all—of what has been discovered as a result of the court's order under Rule 26(b)(1). It does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery. For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that "[f]reedom of speech . . . does not comprehend the right to speak on any subject at any time." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 394–395 (1950).

The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974); see *Brown* v. *Glines*, 444 U. S. 348, 354–355 (1980); *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976).

A

At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order, such as the one at issue here, may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information"). Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations. See *In re Halkin*, 194 U. S. App. D. C., at 287, 598 F. 2d, at 206–207 (Wilkey, J., dissenting).[18]

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[18] Although litigants do not "surrender their First Amendment rights at the courthouse door," *In re Halkin*, 194 U. S. App. D. C., at 268, 598 F. 2d, at 186, those rights may be subordinated to other interests that arise in

Moreover, pretrial depositions and interrogatories are not public components of a civil trial.[19] Such proceedings were not open to the public at common law, *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 389 (1979), and, in general, they are conducted in private as a matter of modern practice. See *id.*, at 396 (BURGER, C. J., concurring); Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983). Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. See *Gannett Co.* v. *DePasquale*,

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this setting. For instance, on several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 563 (1976); *id.*, at 601, and n. 27 (BRENNAN, J., concurring in judgment); *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308, 310–311 (1977); *Sheppard* v. *Maxwell*, 384 U. S. 333, 361 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 104, n. 21 (1981).

[19] Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See *ibid.;* Wash. Super. Ct. Civ. Rule 26(c). Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, *e. g.*, C. D. Cal. Rule 8.3; S. D. N. Y. Civ. Rule 19. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

supra, at 399 (POWELL, J., concurring). As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.

B

Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. *Procunier, supra,* at 413. The Washington Civil Rules enable parties to litigation to obtain information "relevant to the subject matter involved" that they believe will be helpful in the preparation and trial of the case. Rule 26, however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.[20] This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.[21] The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

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[20] See Comments of the Advisory Committee on the 1983 Amendments to Fed. Rule Civ. Proc. 26, 28 U. S. C. App., pp. 729–730 (1982 ed., Supp. I). In *Herbert* v. *Lando,* 441 U. S. 153 (1979), the Court observed: "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and

There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. Cf. *Herbert* v. *Lando*, 441 U. S. 153, 176–177 (1979); *Gumbel* v. *Pitkin*, 124 U. S. 131, 145–146 (1888). As stated by Judge Friendly in *International Products Corp.* v. *Koons*, 325 F. 2d 403, 407–408 (CA2 1963), "[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices'" (citing *Gumbel* v. *Pitkin*, *supra*). The prevention of the abuse that can attend the coerced production of information under

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unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse." *Id.*, at 176–177 (footnote omitted); see also *id.*, at 179 (POWELL, J., concurring). But abuses of the Rules by litigants, and sometimes the inadequate oversight of discovery by trial courts, do not in any respect lessen the importance of discovery in civil litigation and the government's substantial interest in protecting the integrity of the discovery process.

[21] Cf. *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 488–491 (1975). Rule 26(c) includes among its express purposes the protection of a "party or person from annoyance, embarrassment, oppression or undue burden or expense." Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.

a State's discovery rule is sufficient justification for the authorization of protective orders.[22]

C

We also find that the provision for protective orders in the Washington Rules requires, in itself, no heightened First Amendment scrutiny. To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. The Legislature of the State of Washington, following the example of the Congress in its approval of the Federal Rules of Civil Procedure, has determined that such discretion is necessary, and we find no reason to disagree. The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery.[23] The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

V

The facts in this case illustrate the concerns that justifiably may prompt a court to issue a protective order. As we have noted, the trial court's order allowing discovery was extremely broad. It compelled respondents—among other things—to identify all persons who had made donations over a 5-year period to Rhinehart and the Aquarian Foundation, together with the amounts donated. In effect the order would compel disclosure of membership as well as sources of financial support. The Supreme Court of Washington found that dissemination of this information would "result in annoyance, embarrassment and even oppression." 98 Wash. 2d, at 257, 654 P. 2d, at 690. It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law. We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.[24]

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[22] The Supreme Court of Washington properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts: "[A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself." 98 Wash. 2d 226, 254, 654 P. 2d 673, 689 (1982). Cf. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963).

[23] In addition, heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals, as this case illustrates. See, *e. g.*, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (ED Pa. 1981).

The judgment accordingly is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

The Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment. As the Court acknowledges, before approving such protective orders, "it is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Ante*, at 32 (quoting *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974)).

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[24] It is apparent that substantial government interests were implicated. Respondents, in requesting the protective order, relied upon the rights of privacy and religious association. Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been "chilled." See n. 22, *supra*.

In this case, the respondents opposed discovery, and in the alternative sought a protective order for discovered materials, because the "compelled production of the identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association." *Ante*, at 25. The Supreme Court of Washington found that these interests constituted the requisite "good cause" under the State's Rule 26(c) (upon "good cause shown," the court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). 98 Wash. 2d 226, 256, 654 P. 2d 673, 690 (1982). Given this finding, the court approved a protective order limited to "information . . . regarding the financial affairs of the various [respondents], the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various [respondents]." *Ante*, at 27, n. 8. I agree that the respondents' interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment. I therefore join the Court's opinion.

WALLER *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 83-321. Argued March 27, 1984—Decided May 21, 1984*

After court-authorized wiretaps of telephones by Georgia police revealed a large lottery operation, the police executed search warrants at numerous locations, including petitioners' homes. Petitioners and others were then indicted for violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act and other state gambling statutes. Prior to trial, petitioners moved to suppress the wiretaps and evidence seized during the searches. The State moved to close the suppression hearing to the public, alleging that unnecessary "publication" of information obtained under the wiretaps would render the information inadmissible as evidence, and that the wiretap evidence would "involve" the privacy interests of some persons who were indicted but were not then on trial, and some who were not then indicted. The trial court agreed, finding that insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and could not be used in future prosecutions. Accordingly, over petitioners' objections, the court ordered the suppression hearing closed to all persons other than witnesses, court personnel, the parties, and the lawyers. The suppression hearing lasted seven days, but less than 2½ hours were devoted to playing the tapes of the intercepted telephone conversations, and few of them mentioned or involved parties not then before the court. The case was then tried before a jury in open court, and petitioners were acquitted under the RICO Act but convicted under the other statutes. The Georgia Supreme Court affirmed.

Held:

1. Under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the following tests: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure. Cf. *Press-Enterprise Co.* v. *Superior Court of California,* 464 U. S. 501. Pp. 44-47.

2. Under the above tests, the closure of the entire suppression hearing here plainly was unjustified. The State's proffer was not specific as

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*Together with No. 83-322, *Cole et al.* v. *Georgia,* also on certiorari to the same court.

to whose privacy interests might be infringed if the hearing were open to the public, what portions of the wiretap tapes might infringe those interests, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general and did not purport to justify closure of the entire hearing. And the court did not consider alternatives to immediate closure of the hearing. Pp. 48–49.

3. The case is remanded to the state courts to decide what portions, if any, of a new suppression hearing may be closed to the public in light of conditions at the time of that hearing. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial or in some other material change in the positions of the parties. Pp. 49–50.

251 Ga. 124, 303 S. E. 2d 437, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Herbert Shafer argued the cause for petitioners in both cases. With him on the briefs were *Charles Lister, Charles R. Smith, Burt Neuborne,* and *Charles S. Sims.*

Mary Beth Westmoreland, Assistant Attorney General of Georgia, argued the cause for respondent in both cases. With her on the brief were *Michael J. Bowers,* Attorney General, *James P. Googe, Jr.,* Executive Assistant Attorney General, *Marion O. Gordon,* First Assistant Attorney General, *William B. Hill, Jr.,* Senior Assistant Attorney General, *Lewis R. Slaton,* and *H. Allen Moye.*†

JUSTICE POWELL delivered the opinion of the Court.

These cases require us to decide the extent to which a hearing on a motion to suppress evidence may be closed to the public over the objection of the defendant consistently with the Sixth and Fourteenth Amendment right to a public trial.

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†*Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump,* and *Daniel B. Hales* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Alan I. Horowitz;* and for the State of Arizona by *Robert K. Corbin,* Attorney General.

I

Acting under court authorization, Georgia police placed wiretaps on a number of phones during the last six months of 1981. The taps revealed a large lottery operation involved in gambling on the volume of stocks and bonds traded on the New York Stock Exchange. In early January 1982, law enforcement officers simultaneously executed search warrants at numerous locations, including the homes of petitioners. Petitioners and 35 others were indicted and charged with violating the Georgia Racketeer Influenced and Corrupt Organizations (Georgia RICO) Act, Ga. Code Ann. §§ 16–14–1 to 16–14–15 (1982 and Supp. 1983), and with commercial gambling and communicating gambling information in violation of Ga. Code Ann. §§ 16–12–22 and 16–12–28 (1982).

Prior to the separate trial of petitioners and 13 other defendants, petitioners moved to suppress the wiretaps and the evidence seized during the searches. They asserted, *inter alia*, that the warrants authorizing the wiretaps were unsupported by probable cause and based on overly general information, that the taps were conducted without adequate supervision, and that the resulting searches were indiscriminate, "exploratory and general." App. 11a. The State moved to close to the public any hearing on the motion to suppress. The closure motion stated that in order to validate the seizure of evidence derived from the wiretaps the State would have to introduce evidence "which [might] involve a reasonable expectation of privacy of persons other than" the defendants. *Id.*, at 6a.

On June 21, 1982, a jury was empaneled and then excused while the court heard the closure and suppression motions. The prosecutor argued that the suppression hearing should be closed because under the Georgia wiretap statute "[a]ny publication" of information obtained under a wiretap warrant that was not "necessary and essential" would cause the information to be inadmissible as evidence. See Ga. Code Ann. § 16-11-64(b)(8) (1982).[1] The prosecutor stated that the evidence derived in the wiretaps would "involve" some persons who were indicted but were not then on trial, and some persons who were not then indicted. He said that if published in open court, the evidence "[might] very well be tainted." App. 13a. The trial court agreed. It found that insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and could not be used in future prosecutions. *Id.*, at 14a. Over objection,[2] the court ordered the suppression hearing closed to all persons other than witnesses, court personnel, the parties, and the lawyers.

The suppression hearing lasted seven days. The parties do not dispute that less than 2½ hours were devoted to playing tapes of intercepted telephone conversations. The intercepted conversations that were played included some persons who were not then on trial, but no one who had not been named in the indictment; one person who had not been indicted was mentioned in the recorded calls. The remainder of the hearing concerned such matters as the procedures used in obtaining and executing the search warrants and wiretap authorizations, the procedures followed in preserving the tape recordings, and certain allegations of police and prosecutorial misconduct.

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[1] The statute barring publication is part of a section authorizing wiretaps pursuant to warrant. At the time of trial, the statute read:

"Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution." Ga. Code Ann. § 26-3004(k) (1977 and Supp. 1981) (subsequently recodified as § 16-11-64(b)(8)).

[2] Counsel for petitioners Waller, Thompson, Eula Burke, and W. B. Burke lodged an objection to closing the hearing. Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing. App. 14a, 15a. Respondent argues that Cole is precluded from challenging the closure. The Georgia Supreme Court appears to have considered the objections of all the petitioners on their merits. 251 Ga. 124, 126-127, 303 S. E. 2d 437, 441 (1983). Cole's claims in this Court are identical to those of the others. Since the cases must be remanded, we remand Cole's case as well. The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law.

Agreeing with the State's concession that 10 boxes of documents seized during the searches were "personal, no[n]crime related," Tr. of Suppression Hearing 635, the trial court ordered them suppressed, *id.*, at 642; App. 19a. It refused to suppress a comparable amount of other material. The case was then tried to the jury in open court. Petitioners were acquitted of the charges under the Georgia RICO statute, but were convicted of commercial gambling and communicating gambling information. Prior to the trial of the remaining persons named in the indictment, the transcript of the suppression hearing was released to the public.

The Georgia Supreme Court affirmed the convictions. 251 Ga. 124, 303 S. E. 2d 437 (1983). On the open-trial issue, the court ruled that the trial court had properly balanced petitioners' rights to a public hearing against the privacy rights of others under Georgia law and the Sixth Amendment. *Id.*, at 126–127, 303 S. E. 2d, at 441. We granted certiorari to decide whether the defendant's Sixth Amendment right to a public trial applies to a suppression hearing. 464 U. S. 959 (1983). We hold that it does, and that the trial court failed to give proper weight to Sixth Amendment concerns. Accordingly, we reverse.

II

These cases present three questions: First, does the accused's Sixth Amendment right to a public trial extend to a suppression hearing conducted prior to the presentation of evidence to the jury? Second, if so, was that right violated here? Third, if so, what is the appropriate remedy?[3]

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[3] Petitioners advance two Fourth Amendment arguments, both of which may be disposed of summarily. First, they assert that a forfeiture section

A

This Court has not recently considered the extent of the accused's right under the Sixth Amendment to insist upon a public trial, and has never considered the extent to which that right extends beyond the actual proof at trial. We are not, however, without relevant precedents. In several recent cases, the Court found that the press and public have a qualified First Amendment right to attend a criminal trial. *Globe Newspaper Co.* v. *Superior Court for Norfolk County*,

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of the Georgia RICO statute that authorizes certain warrantless seizures of all property used in or derived from a pattern of racketeering activity is facially invalid under the Fourth Amendment. See Ga. Code Ann. § 16-14-7(f) (1982 and Supp. 1983). We find that petitioners have not established that they have standing to challenge the statute in the present proceeding. It appears that all the evidence that was admitted at trial was seized under the authority of the search warrants, not pursuant to the statute. The opinion below is not to the contrary. The fact that the Georgia Supreme Court found standing does not permit us to avoid the responsibility of ensuring that our order will be other than advisory.

Petitioners' second Fourth Amendment challenge is that police so "flagrant[ly] disregard[ed]" the scope of the warrants in conducting the seizures at issue here that they turned the warrants into impermissible general warrants. Petitioners rely on lower court cases such as *United States* v. *Heldt*, 215 U. S. App. D. C. 206, 227, 668 F. 2d 1238, 1259 (1981) *(per curiam)*, cert. denied *sub nom. Hubbard* v. *United States*, 456 U. S. 926 (1982), and *United States* v. *Rettig*, 589 F. 2d 418, 423 (CA9 1978), for the proposition that in such circumstances the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed. Petitioners do not assert that the officers exceeded the scope of the warrant in the places searched. Rather, they say only that the police unlawfully seized and took away items unconnected to the prosecution. The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well. See, *e. g.*, *Andresen* v. *Maryland*, 427 U. S. 463, 482, n. 11 (1976); *United States* v. *Offices Known As 50 State Distributing Co.*, 708 F. 2d 1371, 1376 (CA9 1983), cert. denied, 465 U. S. 1021 (1984); *United States* v. *Tamura*, 694 F. 2d 591, 597 (CA9 1982); *United States* v. *Holmes*, 452 F. 2d 249, 259 (CA7 1971).

457 U. S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia,* 448 U. S. 555 (1980). We also have extended that right not only to the trial as such but also to the *voir dire* proceeding in which the jury is selected. *Press-Enterprise Co.* v. *Superior Court of California,* 464 U. S. 501 (1984). Moreover, in an earlier case in this line, *Gannett Co.* v. *DePasquale,* 443 U. S. 368 (1979), we considered whether this right extends to a pretrial suppression hearing. While the Court's opinion did not reach the question, *id.*, at 392, a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings, *id.*, at 397 (POWELL, J., concurring) (basing right on First Amendment); *id.*, at 406 (BLACKMUN, J., joined by BRENNAN, WHITE, and MARSHALL, JJ., dissenting in part) (basing right on Sixth Amendment).

In each of these cases the Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care. We stated the applicable rules in *Press-Enterprise:*

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." 464 U. S., at 510.

Accord, *Globe Newspaper Co., supra,* at 606–607; *Richmond Newspapers, supra,* at 580–581 (opinion of BURGER, C. J.); *Gannett,* 443 U. S., at 392–393 *(semble); id.*, at 400–401 (POWELL, J., concurring); *id.*, at 440–446 (BLACKMUN, J., dissenting in part).

As noted, the analysis in these cases has proceeded largely under the First Amendment. Nevertheless, there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and "[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Gannett*, 443 U. S., at 380.

> "'"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."'" *Ibid.* (quoting *In re Oliver*, 333 U. S. 257, 270, n. 25 (1948), in turn quoting 1 T. Cooley, Constitutional Limitations 647 (8th ed. 1927)).[4]

In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. See *In re Oliver*, *supra*, at 270, n. 24; *Douglas* v. *Wainwright*, 714 F. 2d 1532, 1541 (CA11 1983), cert. pending, Nos. 83–817, 83–995; *United States ex rel. Bennett* v. *Rundle*, 419 F. 2d 599, 606 (CA3 1969).

These aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence. As several of the individual opinions in *Gannett* recognized, suppression hearings often are as important as the trial itself. 443 U. S., at 397, n. 1 (POWELL, J., concurring); *id.*, at 434–436 (BLACK-

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[4] Accord, *Estes* v. *Texas*, 381 U. S. 532, 588 (1965) (Harlan, J., concurring) ("Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings"); *In re Oliver*, 333 U. S., at 270 ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power").

MUN, J., dissenting in part); see also *id.*, at 397 (BURGER, C. J., concurring). In *Gannett*, as in many cases, the suppression hearing was the *only* trial, because the defendants thereafter pleaded guilty pursuant to a plea bargain.

In addition, a suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. The outcome frequently depends on a resolution of factual matters. See *id.*, at 434 (BLACKMUN, J., dissenting in part). The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. As the Court of Appeals for the Third Circuit has noted, "[s]trong pressures are naturally at work on the prosecution's witnesses to justify the propriety of their conduct in obtaining" the evidence. *Rundle*, *supra*, at 605. The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.[5] In sum, we hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors.[6]

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[5] To the extent there is an independent public interest in the Sixth Amendment public-trial guarantee, see *Gannett*, 443 U. S., at 383; cf. *Globe Newspaper*, 457 U. S., at 604, it applies with full force to suppression hearings. This case is an example. The defendants alleged that police conducted general searches and wholesale seizures in over 150 homes, and eavesdropped on more than 800 hours of telephone conversations by means of effectively unsupervised wiretaps. Cf. *id.*, at 605 (First Amendment right of access to criminal trials "ensure[s] that [the] constitutionally protected 'discussion of governmental affairs' is an informed one").

[6] One of the reasons often advanced for closing a trial—avoiding tainting of the jury by pretrial publicity, *e. g.*, *Press-Enterprise*, 464 U. S., at 510—is largely absent when a defendant makes an informed decision to object to the closing of the proceeding. In addition, that rationale is further attenuated where, as here, the jurors have been empaneled and instructed not to discuss the case or read or view press accounts of the matter. Tr. 238–239, 240–241, 293–294.

Petitioners also make a claim to an open trial under the First Amendment. In view of our holding, there is no need to discuss that claim.

B

Applying these tests to the cases at bar, we find the closure of the entire suppression hearing plainly was unjustified. Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. In this case, the only evidence about which the prosecutor expressed concern was the information derived from the wiretaps; he argued that unnecessary "publication" would render the taps inadmissible under the Georgia wiretap statute. App. 13a. The Georgia Supreme Court advanced the more general, but essentially identical, interest in protecting the privacy of persons not before the court. 251 Ga., at 126–127, 303 S. E. 2d, at 441. Under certain circumstances, these interests may well justify closing portions of a suppression hearing to the public. See *Press-Enterprise*, 464 U. S., at 511–512.

Here, however, the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing.[7] The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, *in camera* if necessary, and closing only those parts of the hearing that jeopardized the interests advanced.[8] As it turned out, of course, the closure was far more extensive than necessary. The tapes lasted only 2½ hours of the 7-day hearing, and few of them mentioned or involved parties not then before the court.

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[7] The court's only relevant finding was as follows: "If you plan to offer evidence, or if you are going to offer evidence that relates not only to those defendants not on trial but to other offenders, . . . in my judgment insofar as they are concerned, it would amount to a publication and it would be tainted because of the publication." App. 14a.

C

The question that remains is what relief should be ordered to remedy this constitutional violation. Petitioners argue that a new trial on the merits should be ordered. The Solicitor General, appearing on behalf of the United States as *amicus curiae*, suggests that at most only a new suppression hearing be directed. The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee.[9] We agree with that view, but we do not think it requires a new trial in this case. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. Cf. *Goldberg* v. *United States*, 425 U. S. 94, 111 (1976); *Jackson* v. *Denno*, 378 U. S. 368, 394–396 (1964).

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[8] The *post hoc* assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record. The assertion finds little or no support in the record, and is itself too broad to meet the *Press-Enterprise* standard.

[9] See, *e. g.*, *Douglas* v. *Wainwright*, 714 F. 2d 1532, 1542 (CA11 1983) (citing cases), cert. pending, Nos. 83–817, 83–995. See also *Levine* v. *United States*, 362 U. S. 610, 627, n. (1960) (BRENNAN, J., dissenting) ("[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings"). The general view appears to be that of the Court of Appeals for the Third Circuit. It noted in an en banc opinion that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." *United States ex rel. Bennett* v. *Rundle*, 419 F. 2d 599, 608 (1969). While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. See also *State* v. *Sheppard*, 182 Conn. 412, 418, 438 A. 2d 125, 128 (1980) ("Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied"); *People* v. *Jones*, 47 N. Y. 2d 409, 416, 391 N. E. 2d 1335, 1340 (1979) ("The harmless error rule is no way to gauge the great, though intangible, societal loss that flows" from closing courthouse doors).

In these cases, it seems clear that unless the State substantially alters the evidence it presents to support the searches and wiretaps here, significant portions of a new suppression hearing must be open to the public. We remand to the state courts to decide what portions, if any, may be closed. This decision should be made in light of conditions at the time of the new hearing, and only interests that still justify closure should be considered. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties.

The judgments below are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-56. Argued February 27, 1984—Decided May 21, 1984

Under the Medicare program, providers of health care services are reimbursed for the reasonable cost of services rendered to Medicare beneficiaries and are required to submit annual cost reports which are audited to determine actual costs. The Secretary of Health and Human Services (Secretary) may reopen any reimbursement determination within a 3-year period and make appropriate adjustments. Respondent nonprofit corporation (hereafter respondent), pursuant to its contract to provide home health care services under the Medicare program, received reimbursement through a fiscal intermediary, Travelers Insurance Cos. (Travelers). Respondent also received a federal grant under the Comprehensive Employment and Training Act (CETA), which authorized the use of federal funds to provide training and job opportunities for economically disadvantaged persons. This made it possible for respondent to take on additional personnel and to expand its home health care services. A regulation to prevent double reimbursement of providers' costs indicated that grants received by a provider to pay special operating costs must be subtracted from the reasonable costs for which the provider may be reimbursed under the Medicare program. Respondent asked Travelers whether the salaries of its CETA-funded employees who provided services to Medicare patients were reimbursable as reasonable costs under Medicare, and was orally advised by Travelers' Medicare manager that the CETA funds were "seed money" as defined in the Provider Reimbursement Manual to mean "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies," and that therefore, even though the CETA employees' salaries constituted specific operating costs paid by a federal grant, they were reimbursable under the Medicare program. Relying on this advice, respondent included costs for which it was receiving CETA reimbursement in its cost reports for fiscal years 1975, 1976, and 1977, and received reimbursement for those sums. Eventually, however, Travelers, as it should have done previously, referred respondent's inquiry to the Department of Health and Human Services, and was formally advised that the CETA funds were not "seed money" and thus had to be subtracted from respondent's Medicare reimbursement. Travelers then reopened respondent's cost reports for the years in question and recomputed the reimbursable costs, determining that respondent had been overpaid $71,480. When Travelers demanded repayment of this amount, respondent filed suit in Federal District Court, but, after it had obtained temporary injunctive relief, the parties stipulated that the suit would be stayed pending administrative review. Thereafter, while rejecting the position that CETA funds were "seed money," the Provider Reimbursement Review Board found that the Secretary's right to recoup the 1975 overpayment was barred because Travelers had not given respondent a written notice of reopening within the 3-year limitation period, and accordingly reduced the amount in dispute. Respondent then filed another suit in the District Court seeking review of this determination. Consolidating the two suits, the court ruled in the Secretary's favor, rejecting respondent's claim that the Secretary ought to be estopped to deny that the CETA funds were "seed money" because of the representations of the Secretary's agent, Travelers. The Court of Appeals reversed, holding that the Government may be estopped by the "affirmative misconduct" of its agents and that Travelers' erroneous advice, coupled with its failure to refer the question to the Secretary, constituted such misconduct.

Held: The Government is not estopped from recovering the funds in question from respondent, since respondent has not demonstrated that the traditional elements of an estoppel are present with respect to either its change in position or its reliance on Travelers' advice. Pp. 59–66.

(a) The consequences of the Government's misconduct were not entirely adverse, since respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which respondent has lost any legal right or suffered any adverse change in its status. Respondent cannot claim any right to expand its services to levels greater than those it would have provided had the error never occurred. Curtailment of operation does not justify an estoppel when the expansion of respondent's operation was achieved through unlawful access to federal funds. Respondent cannot raise an estoppel without proving that it would be significantly worse off than if it had never obtained the CETA funds in question. Pp. 61–63.

(b) The regulations governing the cost reimbursement provisions of Medicare should and did put respondent on ample notice of the care with which its cost reports must be prepared, and the care which would be taken to review them within the relevant 3-year period. Yet respondent prepared those reports on the basis of an oral policy judgment by an official who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party and therefore cannot estop the Government. Pp. 63–66.

698 F. 2d 615, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 66.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Carolyn F. Corwin, William Kanter,* and *Richard A. Olderman.*

Raymond G. Hasley argued the cause for respondents. With him on the brief was *Brian W. Ashbaugh.**

JUSTICE STEVENS delivered the opinion of the Court.

Under what is recognized for present purposes as an incorrect interpretation of rather complex federal regulations, during 1975, 1976, and 1977 respondent received and expended $71,480 in federal funds to provide health care services to Medicare beneficiaries to which it was not entitled. The question presented is whether the Government is estopped from recovering those funds because respondent relied on the express authorization of a responsible Government agent in making the expenditures.

I

Under the Medicare program, Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. §§ 1395–1395vv, providers of health care services are reimbursed for the reasonable cost of services rendered to Medicare beneficiaries as determined by the Secretary of Health and Human Services (Secretary). § 1395x(v)(1)(A). Providers receive interim payments at least monthly covering the cost of services they have rendered. § 1395g(a). Congress recognized, however, that these interim payments would not always correctly reflect the amount of reimbursable costs, and accordingly instructed the Secretary to develop mechanisms for making appropriate retroactive adjustments when reimbursement is found to be inadequate or excessive. § 1395x(v)(1)(A)(ii).[1] Pursuant to this statutory mandate, the Secretary requires providers to submit annual cost reports which are then audited to determine actual costs. 42 CFR §§ 405.454, 405.1803 (1982). The Secretary may reopen any reimbursement determination within a 3-year period and make appropriate adjustments. § 405.1885.

**Jack N. Goodman* filed a brief for the National Association for Home Care et al. as *amici curiae* urging affirmance.

The Act also permits a provider to elect to receive reimbursement through a "fiscal intermediary." 42 U. S. C. § 1395h; 42 CFR § 421.103 (1982). If the intermediary the provider has nominated meets the Secretary's requirements, the Secretary then enters into an agreement with the intermediary to have it perform those administrative responsibilities she assigns it. §§ 421.5, 421.110. These duties include receipt, disbursement, and accounting for funds used in making Medicare payments, auditing the records of providers in order to ensure payments have been proper, resolving disputes over cost reimbursement, reviewing and reconsidering payments to providers, and recovering overpayments to providers. §§ 421.100(b), (c), (e), (f), 421.120(e). The fiscal intermediary must also "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U. S. C. § 1395h(a)(2)(A).

Respondent Community Health Services of Crawford County, Inc. (hereafter respondent), is a nonprofit corporation. In 1966 it entered into a contract with petitioner's predecessor, the Secretary of Health, Education, and Welfare, to provide home health care services to individuals eligible for benefits under Part A of the Medicare program, 42 U. S. C. §§1395c to 1395i–2. Under the contract, respondent received reimbursement through a fiscal intermediary, the Travelers Insurance Cos. (Travelers).

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[1] Congress also authorized petitioner to adjust interim payments on account of previous overpayments or underpayments. § 1395g(a).

In 1973 Congress enacted the Comprehensive Employment and Training Act (CETA), 87 Stat. 839, codified, as amended, at 29 U. S. C. §801 *et seq.* (1976 ed. and Supp. V), and repealed, Pub. L. 97–300, 96 Stat. 1357, authorizing the use of federal funds to provide training and job opportunities for economically disadvantaged persons. In 1975 respondent began participating in the program, which reimbursed it for the salaries and fringe benefits paid to certain of its employees. CETA funds made it possible for respondent to take on additional personnel and to provide additional home health care services.

To prevent what would be in effect double reimbursement of providers' costs, one of the regulations concerning reasonable costs reimbursable under the Medicare program indicates that grants received by a provider in order to pay specific operating costs must be subtracted from the reasonable costs for which the provider may receive reimbursement.[2]

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[2] "(a) *Principle.* Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable cost. Grants, gifts, or endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.

"(b) *Definitions*—(1) *Unrestricted grants, gifts, income from endowment.* Unrestricted grants, gifts, and income from endowments are funds, cash or otherwise, given to a provider without restriction by the donor as to their use.

"(2) *Designated or restricted grants, gifts, and income from endowments.* Designated or restricted grants, gifts, and income from endowments are funds, cash or otherwise, which must be used only for the specific purpose designated by the donor. This does not refer to unrestricted grants, gifts, or income from endowments which have been restricted for a specific purpose by the provider.

"(c) *Application.* (1) Unrestricted funds, cash or otherwise, are generally the property of the provider to be used in any manner its management

After obtaining a CETA grant, respondent's administrator contacted Travelers to ask whether the salaries of its CETA-funded employees who provided services to patients eligible for Medicare benefits were reimbursable as reasonable costs under Medicare. Travelers' Medicare manager orally advised respondent that the CETA funds were "seed money" within the meaning of § 612.2 of the Provider Reimbursement Manual, which is defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies,"[3] and therefore, even though the CETA employees' salaries constituted specific operating costs paid by a federal grant, they were reimbursable under the Medicare program.

Relying on Travelers' advice, respondent included costs for which it was receiving CETA reimbursement in its cost reports, and received reimbursement for those sums amounting

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deems appropriate and should not be deducted from operating costs. It would be inequitable to require providers to use the unrestricted funds to reduce the payments for care. The use of these funds is generally a means of recovering costs which are not otherwise recoverable.

"(2) Donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs and benefit all patients who use services covered by the donation. *If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.*" 42 CFR § 405.423 (1982) (emphasis supplied).

[3] "*Seed Money Grants.*—Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as 'seed money' grants. 'Seed money' grants are not deducted from costs in computing allowable costs. These grants are usually made to cover specific operating costs or group[s] of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers." Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 612.2 (Aug. 1968), reproduced in 1 CCH, Medicare & Medicaid Guide ¶ 5461 (1983).

to $7,694, $32,460, and $31,326 in fiscal 1975, 1976, and 1977, respectively.[4] On several occasions during this period, respondent requested and received from Travelers oral verification of the propriety of this treatment.[5] With these additional funds, respondent expanded its annual number of home health care visits from approximately 4,000 in 1974 to over 81,000 in the next three years. Its annual budget increased during that period from about $200,000 to about $900,000.

It is undisputed that correct administrative practice required Travelers to refer respondent's inquiry to the Department of Health and Human Services for a definitive answer. However, Travelers did not do this until August 7, 1977, when a written request for instructions was finally submitted to the Philadelphia office of the Department's Bureau of Health Insurance. Travelers was then formally advised that the CETA funds were not "seed money" and therefore had to be subtracted from respondent's Medicare reimbursement. On October 7, 1977, Travelers formally notified respondent of this determination. Travelers then reopened respondent's cost reports for the preceding three years and recomputed respondent's reimbursable costs, determining that respondent had been overpaid a total of $71,480.

In May 1978 Travelers made a formal demand for repayment of the disputed amount. Respondent filed suit and obtained temporary injunctive relief against the Secretary and Travelers; in November 1979, the parties entered into a stipulation providing that the Secretary would postpone any attempts at recoupment and that the civil action would be stayed pending the outcome of administrative review.

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[4] Presumably because CETA program participants provided services to some individuals not eligible for Medicare benefits, the aggregate amount of CETA reimbursements was substantially larger than the portion for which Medicare reimbursement was claimed. The total amount of reimbursement respondent received in CETA funds was $16,555, $53,952, and $81,118 in 1975, 1976, and 1977, respectively.

[5] From its review of the record the Court of Appeals concluded that respondent had consulted Travelers and was advised that the CETA grants qualified as "seed money" on five separate occasions. However, the District Court made no finding as to the number of times that this advice was requested and received.

Thereafter, the Secretary's Provider Reimbursement Review Board (PRRB) conducted a hearing and issued a written opinion rejecting the position that CETA funds were "seed money." The PRRB found, however, that the Secretary's right to recoup the 1975 overpayment was barred because Travelers had not given respondent a written notice of reopening within the 3-year limitations period;[6] thus, the amount in dispute was reduced to approximately $63,800. On April 10, 1980, respondent filed a complaint in the District Court seeking review of the administrative determination. The District Court consolidated that case with the equitable action that had been filed about two years earlier. On cross-motions for summary judgment, the District Court ruled in favor of the Secretary, accepting the PRRB's view of the Secretary's regulations and rejecting respondent's claim that the Secretary ought to be estopped to deny that the CETA grants were "seed money" because of the representations of her agent, Travelers. The District Court held that it was unreasonable for respondent to believe it could be in effect twice reimbursed for a given expense.[7]

The Court of Appeals reversed, reaching only the estoppel question. *Community Health Services of Crawford County, Inc.* v. *Califano*, 698 F. 2d 615 (CA3 1983). It held that the Government may be estopped by the "affirmative misconduct" of its agents and that Travelers' erroneous advice coupled with its failure to refer the question to the Secretary constituted such misconduct. It rejected as "clearly erroneous" the District Court's finding that it was unreasonable for respondent to rely on Travelers' advice, concluding instead that respondent acted reasonably because the relevant regulation had no clear meaning and respondent had no source other than Travelers to which it could turn for advice.

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[6] The Board also found that the required written notice for 1976 had not been served on respondent, but noted that the Secretary still had time to comply with the notice requirement for that year. A timely notice for 1976 was thereafter served on respondent.

[7] The District Court also held that Travelers was not independently liable to respondent for its incorrect advice.

II

Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear:

> "If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . the first person is not entitled
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> . . . . .
>
> "(b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired." Restatement (Second) of Torts § 894(1) (1979).[8]

Thus, the party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse,"[9] and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.[10] See *Wilber National Bank* v. *United States*, 294 U. S. 120, 124–125 (1935).

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[8] See also Restatement (Second) of Agency § 8B (1958).

[9] 3 J. Pomeroy, Equity Jurisprudence § 805, p. 192 (S. Symons ed. 1941); see also *id.*, § 812.

[10] "The truth concerning these material facts must be unknown to the other party claiming the benefit of the estoppel, not only at the time of the conduct which amounts to a representation or concealment, but also at the time when that conduct is acted upon by him. If, at the time when he

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.[11] Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past,[12] and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from

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acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment." *Id.*, § 810, at 219 (footnote omitted).

[11] See, *e. g.*, *INS* v. *Hibi*, 414 U. S. 5, 8 (1973) *(per curiam)*; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383 (1947).

[12] See *INS* v. *Miranda*, 459 U. S. 14, 19 (1982) *(per curiam)*; *Schweiker* v. *Hansen*, 450 U. S. 785, 788 (1981) *(per curiam)*; *Montana* v. *Kennedy*, 366 U. S. 308, 315 (1961). In fact, at least two of our cases seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception. See *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655, 670–675 (1973) (criminal defendant may assert as a defense that the Government led him to believe that its conduct was legal); *Moser* v. *United States*, 341 U. S. 41 (1951) (applicant cannot be deemed to waive right to citizenship on the basis of a form he signed when he was misled as to the effect signing would have on his rights). See also *Kaiser Aetna* v. *United States*, 444 U. S. 164, 178–180 (1979); *Santobello* v. *New York*, 404 U. S. 257 (1971); *Branson* v. *Wirth*, 17 Wall. 32, 42 (1873). This principle also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 295 (1974); *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800, 807–808 (1973) (plurality opinion); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 203 (1947).

estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.[13] But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present. We are unpersuaded that that has been done in this case with respect to either respondent's change in position or its reliance on Travelers' advice.

III

To analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse. In this case the consequences of the Government's misconduct were not entirely adverse. Respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which the respondent has lost any legal right, either vested or contingent, or suffered any adverse change in its status.[14] When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position. Here respondent lost no rights but merely was induced to do something which could be corrected at a later time.[15]

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[13] See generally *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government"); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S., at 387–388 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"); *Brandt* v. *Hickel*, 427 F. 2d 53, 57 (CA9 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"); *Menges* v. *Dentler*, 33 Pa. 495, 500 (1859) ("Men naturally trust in their government, and ought to do so, and they ought not to suffer for it"). See also *Giglio* v. *United States*, 405 U. S. 150, 154–155 (1972).

There is no doubt that respondent will be adversely affected by the Government's recoupment of the funds that it has already spent. It will surely have to curtail its operations and may even be forced to seek relief from its debts through bankruptcy. However, there is no finding as to the extent of the likely curtailment in the volume of services provided by respondent, much less that respondent will reduce its activities below the level that obtained when it was first advised that the double reimbursement was proper. Respondent may need an extended period of repayment or other modifications in the recoupment process if it is to continue to operate, but questions concerning the Government's method of enforcing collection are not before us. The question is whether the Government has entirely forfeited its right to the money.

A for-profit corporation could hardly base an estoppel on the fact that the Government wrongfully allowed it the interest-free use of taxpayers' money for a period of two or three years, enabling it to expand its operation.[16] No more can respondent claim any right to expand its services to levels greater than those it would have provided had the error never occurred. Curtailment of operation does not justify an estoppel when—by respondent's own account—the expansion of its operation was achieved through unlawful access to governmental funds. And even if there will be a reduction below the service provided by respondent prior to its receipt of CETA funds, the record does not foreclose the possibility that the aggregate advantages to the community stemming from respondent's use of the money have more than offset the actual hardship associated with now being required to restore these funds. Respondent cannot raise an estoppel without proving that it will be significantly worse off than if it had never obtained the CETA funds in question.

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[14] This case is, therefore, plainly distinguishable from *Moser* v. *United States*, 341 U. S. 41 (1951), in which the petitioner "was led to believe that he would not thereby lose his rights to citizenship." *Id.*, at 46.

[15] See *Schweiker* v. *Hansen*, 450 U. S., at 789 *(per curiam)*.

[16] See *United States* v. *Stewart*, 311 U. S. 60, 70 (1940); *Sutton* v. *United States*, 256 U. S. 575 (1921); *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291 (1902); *Hart* v. *United States*, 95 U. S. 316 (1877). See also *Automobile Club* v. *Commissioner*, 353 U. S. 180 (1957).

IV

Justice Holmes wrote: "Men must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.[17]

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[17] "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S., at 384.

See *United States* v. *California*, 332 U. S. 19, 39–40 (1947); *United States* v. *Stewart*, 311 U. S., at 70; *United States* v. *San Francisco*, 310 U. S. 16, 31–32 (1940); *Wilber National Bank* v. *United States*, 294 U. S. 120, 123–124 (1935); *Utah* v. *United States*, 284 U. S. 534, 545–546 (1932); *Jeems Bayou Fishing & Hunting Club* v. *United States*, 260 U. S. 561, 564

As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements for cost reimbursement. Since it also had elected to receive reimbursement through Travelers, it also was acquainted with the nature of and limitations on the role of a fiscal intermediary. When the question arose concerning respondent's CETA funds, respondent's own action in consulting Travelers demonstrates the necessity for it to have obtained an interpretation of the applicable regulations; respondent indisputably knew that this was a doubtful question not clearly covered by existing policy statements. The fact that Travelers' advice was erroneous is, in itself, insufficient to raise an estoppel,[18] as is the fact that the Secretary had not anticipated this problem and made a clear resolution available to respondent.[19] There is simply no requirement that the Government anticipate every problem that may arise in the administration of a complex program such as Medicare; neither can it be expected to ensure that every bit of informal advice given by its agents in the course of such a program will be sufficiently reliable to justify expenditure of sums of money as substantial as those spent by respondent.[20] Nor was the advice given under circumstances that should have induced respondent's reliance. As a recipient of public funds well acquainted with the role of a fiscal intermediary, respondent knew Travelers only acted as a conduit; it could not resolve policy questions. The relevant statute, regulations, and Reimbursement Manual, with which respondent should have

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(1923); *Sutton* v. *United States*, 256 U. S., at 579; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409 (1917); *Pine River Logging Co.* v. *United States*, 186 U. S., at 291; *Hart* v. *United States*, 95 U. S., at 318–319; *Gibbons* v. *United States*, 8 Wall. 269, 274 (1869); *Lee* v. *Munroe*, 7 Cranch 366 (1813).

[18] See *Schweiker* v. *Hansen*, 450 U. S., at 789–790 *(per curiam); Montana* v. *Kennedy*, 366 U. S. 308, 314–315 (1961).

[19] See *INS* v. *Miranda*, 459 U. S. 14 (1982) *(per curiam); INS* v. *Hibi*, 414 U. S. 5 (1973) *(per curiam).*

[20] See generally *Schweiker* v. *Hansen*, *supra.*

been and was acquainted, made that perfectly clear.[21] Yet respondent made no attempt to have the question resolved by the Secretary; it was satisfied with the policy judgment of a mere conduit.[22]

The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice that underlay respondent's cost reports. That is especially true when a complex program such as Medicare is involved, in which the need for written records is manifest.

In sum, the regulations governing the cost reimbursement provisions of Medicare should and did put respondent on ample notice of the care with which its cost reports must be prepared, and the care which would be taken to review them within the relevant 3-year period. Yet respondent prepared those reports on the basis of an oral policy judgment by an official who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party. It therefore cannot estop the Government.

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[21] Under the law of agency, a principal may be bound by the acts of an agent only if that agent acted with actual or apparent authority. Restatement (Second) of Agency §§ 145, 159 (1958). Travelers had neither with respect to the interpretation of the regulations in question. See also *id.*, § 141, Comment *b* (principal may be estopped to deny lack of actual or apparent authority only when it negligently leads third parties to believe authority exists).

[22] The Court of Appeals believed that respondent did all it could have done since it was unable to deal with the Secretary directly. However, that belief, even if accurate, would not make respondent's reliance on Travelers' policy judgment any more reasonable. Moreover, given the role of Travelers as a conduit for information, it is far from clear that had respondent specifically requested that Travelers pass on its question to the Department, Travelers would not have been under a duty to do so. Even if there were no such duty, there is nothing in the record to indicate that Travelers would have been unwilling to honor such a request.

Thus, assuming estoppel can ever be appropriately applied against the Government, it cannot be said that the detriment respondent faces is so severe or has been imposed in such an unfair way that petitioner ought to be estopped from enforcing the law in this case. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I entirely agree with the Court that there was no estoppel in favor of respondent by reason of the Government's conduct in this case, because even a private party under like circumstances would not have been estopped. I write separately because I think the Court's treatment of our decided cases in this area gives an inaccurate and misleading impression of what those cases have had to say as to the circumstances, if any, under which the Government may be estopped to enforce the laws.

Sixty-seven years ago, in *Utah Power & Light Co.* v. *United States*, 243 U. S. 389 (1917), private parties argued that they had acquired rights in federal lands, contrary to the law, because Government employees had acquiesced in their exercise of those rights. In that case the Court laid down the general principle governing claims of estoppel on behalf of private individuals against the Government:

> "As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. [Citations omitted.] And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. [Citation omitted.]" *Id.*, at 409.

Since then we have applied that principle in a case where a private party relied on the misrepresentation of a Government agency as to the coverage of a crop insurance policy, a misrepresentation which the Court agreed would have estopped a private insurance carrier. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383–386 (1947). We have applied it in a case where a private party relied on a misrepresentation by a Government employee as to Social Security eligibility, a misrepresentation which resulted in the applicant's losing 12 months of Social Security benefits. *Schweiker* v. *Hansen*, 450 U. S. 785 (1981) *(per curiam).* And we have applied it on at least three occasions to claims of estoppel in connection with the enforcement of the immigration laws and the denial of citizenship because of the conduct of immigration officials. *INS* v. *Miranda*, 459 U. S. 14 (1982) *(per curiam); INS* v. *Hibi*, 414 U. S. 5 (1973) *(per curiam); Montana* v. *Kennedy*, 366 U. S. 308, 314–315 (1961). In none of these cases have we ever held the Government to be estopped by the representations or conduct of its agents. In *INS* v. *Hibi, supra*, at 8, we noted that it is still an open question whether, in some future case, "affirmative misconduct" on the part of the Government might be grounds for an estoppel. See *Montana* v. *Kennedy, supra*, at 314–315.

I agree with the Court that there is no need to decide in this case whether there are circumstances under which the Government may be estopped, but I think that the Court's treatment of that question, *ante*, at 60–61, gives an impression of hospitality towards claims of estoppel against the Government which our decided cases simply do not warrant. In footnote 12, *ante*, at 60, the Court intimates that two of our decisions have allowed the Government to be estopped: *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973), and *Moser* v. *United States*, 341 U. S. 41 (1951). But these cases are not traditional equitable estoppel cases. *Pennsylvania Industrial Chemical Corp.* was a criminal prosecution, and we held that "to the extent that [Government regulations] deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." 411 U. S., at 674. And the Court's rather cryptic opinion in *Moser*, holding that an alien who declined to serve in the Armed Forces was not barred from United States citizenship pursuant to a federal statute, expressly rejected any doctrine of estoppel, and rested on the absence of a knowing and intentional waiver of the right to citizenship. 341 U. S., at 47.

We do not write on a clean slate in this field, and our cases have left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances. Because I think the Court's opinion, in its efforts to phrase new statements of the circumstances under which the Government may be estopped, casts doubt on these decided cases, I concur only in the judgment.

HISHON *v.* KING & SPALDING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-940. Argued October 31, 1983—Decided May 22, 1984

Petitioner, a woman lawyer, was employed in 1972 as an associate with respondent law firm, a general partnership, but her employment was terminated in 1979 after respondent decided not to invite her to become a partner. Petitioner filed a charge with the Equal Employment Opportunity Commission, claiming that respondent had discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964. After the Commission issued a notice of right to sue, petitioner brought this action in Federal District Court under Title VII. Her complaint included allegations that respondent used the possibility of ultimate partnership as a recruiting device to induce her and other young lawyers to become associates at the firm; that respondent represented that advancement to partnership after five or six years was "a matter of course" for associates who received satisfactory evaluations and that associates would be considered for partnership "on a fair and equal basis"; that she relied on these representations when she accepted employment with respondent; that respondent's promise to consider her on a "fair and equal basis" created a binding employment contract; and that respondent discriminated against her on the basis of her sex when it failed to invite her to become a partner. The District Court dismissed the complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership, and the Court of Appeals affirmed.

Held: Petitioner's complaint states a claim cognizable under Title VII, and she therefore is entitled to her day in court to prove her allegations. Pp. 73-79.

(a) Once a contractual employment relationship is established, the provisions of Title VII attach, forbidding unlawful discrimination as to the "terms, conditions, or privileges of employment," which clearly include benefits that are part of the employment contract. If the evidence at trial establishes petitioner's allegation that the parties contracted to have her considered for partnership, that promise clearly was a term, condition, or privilege of her employment. Independent of the alleged contract, Title VII would then bind respondent to consider petitioner for partnership as the statute provides, *i.e.*, without regard to her sex. Moreover, an employer may provide its employees with benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment, may qualify as a "privilege" of employment under Title VII that may not be granted or withheld in a discriminatory fashion. Pp. 73–76.

(b) Even if respondent is correct in its assertion that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply. The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment. It is also of no consequence that employment as an associate necessarily ends upon elevation to partnership; a benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship. Nor does the statute or its legislative history support a *per se* exemption of partnership decisions from scrutiny. And respondent has not shown how application of Title VII in this case would infringe its constitutional rights of expression or association. Moreover, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood* v. *Harrison*, 413 U. S. 455, 470. Pp. 77–78.

678 F. 2d 1022, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 79.

Emmet J. Bondurant argued the cause and filed a brief for petitioner.

Deputy Solicitor General Bator argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief for the United States et al. were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *David A. Strauss*, *Brian K. Landsberg*, *James W. Clute*, and *Philip B. Sklover*.

Charles Morgan, Jr., argued the cause for respondent. With him on the brief were *J. Richard Cohen*, *Steven E. Vagle*, *Hamilton Lokey*, and *Gerald F. Handley*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Association of University Women et al. by *Judith I. Avner* and *Anne E. Simon;* for the American Civil Liberties Union by *Samuel Estreicher*,

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the District Court properly dismissed a Title VII complaint alleging that a law partnership discriminated against petitioner, a woman lawyer employed as an associate, when it failed to invite her to become a partner.

I

A

In 1972 petitioner Elizabeth Anderson Hishon accepted a position as an associate with respondent, a large Atlanta law firm established as a general partnership. When this suit was filed in 1980, the firm had more than 50 partners and employed approximately 50 attorneys as associates. Up to that time, no woman had ever served as a partner at the firm.

Petitioner alleges that the prospect of partnership was an important factor in her initial decision to accept employment with respondent. She alleges that respondent used the possibility of ultimate partnership as a recruiting device to induce petitioner and other young lawyers to become associates at the firm. According to the complaint, respondent represented that advancement to partnership after five or six

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Burt Neuborne, Isabelle Katz Pinzler, E. Richard Larson, Charles S. Sims, and *Mary L. Heen;* for the Anti-Defamation League of B'nai B'rith et al. by *Justin J. Finger, Meyer Eisenberg, Jeffrey P. Sinensky, Leslie K. Shedlin,* and *Nathan Z. Dershowitz;* for California Women Lawyers by *Elizabeth S. Salveson;* for the Dallas Association of Black Women Attorneys et al. by *Neil H. Cogan;* for the NAACP Legal Defense and Educational Fund, Inc., by *Jack Greenberg, Charles S. Ralston, Gail J. Wright,* and *Elizabeth Bartholet;* for the Women's Bar Association of Illinois et al. by *Paddy Harris McNamara, Susan N. Sekuler,* and *Jacqueline S. Lustig;* for the Women's Bar Association of Massachusetts by *Leah Sprague Crothers;* and for Robert Abrams et al. by *Paulette M. Caldwell, Lawrence S. Robbins,* and *Barbara S. Schulman.*

Joseph D. Alviani filed a brief for the New England Legal Foundation as *amicus curiae* urging affirmance.

years was "a matter of course" for associates "who receive[d] satisfactory evaluations" and that associates were promoted to partnership "on a fair and equal basis." Petitioner alleges that she relied on these representations when she accepted employment with respondent. The complaint further alleges that respondent's promise to consider her on a "fair and equal basis" created a binding employment contract.

In May 1978 the partnership considered and rejected Hishon for admission to the partnership; one year later, the partners again declined to invite her to become a partner.[1] Once an associate is passed over for partnership at respondent's firm, the associate is notified to begin seeking employment elsewhere. Petitioner's employment as an associate terminated on December 31, 1979.

B

Hishon filed a charge with the Equal Employment Opportunity Commission on November 19, 1979, claiming that respondent had discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 241, as amended, 42 U. S. C. § 2000e *et seq.* Ten days later the Commission issued a notice of right to sue, and on February 27, 1980, Hishon brought this action in the United States District Court for the Northern District of Georgia. She sought declaratory and injunctive relief, backpay, and compensatory damages "in lieu of reinstatement and promotion to partnership." This, of course, negates any claim for specific performance of the contract alleged.

The District Court dismissed the complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership.[2] 24 FEP Cases 1303 (1980). A divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed. 678 F. 2d 1022 (1982). We granted certiorari, 459 U. S. 1169 (1983), and we reverse.

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[1] The parties dispute whether the partnership actually reconsidered the 1978 decision at the 1979 meeting. Respondent claims it voted not to reconsider the question and that Hishon therefore was required to file her claim with the Equal Employment Opportunity Commission within 180 days of the May 1978 meeting, not the meeting one year later, see 42 U. S. C. § 2000e–5(e). The District Court's disposition of the case made it unnecessary to decide that question, and we do not reach it.

II

At this stage of the litigation, we must accept petitioner's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). The issue before us is whether petitioner's allegations state a claim under Title VII, the relevant portion of which provides as follows:

> "(a) *It shall be an unlawful employment practice for an employer—*
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual with respect to his* compensation, *terms, conditions, or privileges of employment, because of such individual's* race, color, religion, *sex*, or national origin." 42 U. S. C. § 2000e–2(a) (emphasis added).

A

Petitioner alleges that respondent is an "employer" to whom Title VII is addressed.[3] She then asserts that consideration for partnership was one of the "terms, conditions, or privileges of employment" as an associate with respondent.[4] See § 2000e–2(a)(1). If this is correct, respondent could not base an adverse partnership decision on "race, color, religion, sex, or national origin."

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[2] The District Court dismissed under Federal Rule of Civil Procedure 12(b)(1) on the ground that it lacked subject-matter jurisdiction over petitioner's claim. Although limited discovery previously had taken place concerning the manner in which respondent was organized, the court did not find any "jurisdictional facts" in dispute. See *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942). Its reasoning makes clear that it dismissed petitioner's complaint on the ground that her allegations did not state a claim cognizable under Title VII. Our disposition makes it unnecessary to consider the wisdom of the District Court's invocation of Rule 12(b)(1), as opposed to Rule 12(b)(6).

[3] The statute defines an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working

Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship.[5] In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color, religion, sex, or national origin."

Because the underlying employment relationship is contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract. Here, petitioner in essence alleges that respondent made a contract to consider her for partnership.[6] Indeed, this promise was allegedly a key contractual

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day in each of twenty or more calendar weeks in the current or preceding calendar year," § 2000e(b), and a "person" is explicitly defined to include "partnerships," § 2000e(a). The complaint alleges that respondent's partnership satisfies these requirements. App. 6.

[4] Petitioner has raised other theories of Title VII liability which, in light of our disposition, need not be addressed.

[5] Title VII also may be relevant in the absence of an existing employment relationship, as when an employer *refuses* to hire someone. See § 2000e–2(a)(1). However, discrimination in that circumstance does not concern the "terms, conditions, or privileges of employment," which is the focus of the present case.

[6] Petitioner alleges not only that respondent promised to consider her for partnership, but also that it promised to consider her on a "fair and equal basis." This latter promise is not necessary to petitioner's Title VII claim. Even if the employment contract did not afford a basis for an implied condi-

provision which induced her to accept employment. If the evidence at trial establishes that the parties contracted to have petitioner considered for partnership, that promise clearly was a term, condition, or privilege of her employment. Title VII would then bind respondent to consider petitioner for partnership as the statute provides, *i. e.*, without regard to petitioner's sex. The contract she alleges would lead to the same result.

Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment, may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964),[7] or that form "an aspect of the relationship between the employer and employees," *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*,

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tion that the ultimate decision would be fairly made on the merits, Title VII itself would impose such a requirement. If the promised consideration for partnership is a term, condition, or privilege of employment, then the partnership decision must be without regard to "race, color, religion, sex, or national origin."

[7] Senate Report No. 867 concerned S. 1937, which the Senate postponed indefinitely after it amended a House version of what ultimately became the Civil Rights Act of 1964. See 110 Cong. Rec. 14602 (1964). The Report is relevant here because S. 1937 contained language similar to that ultimately found in the Civil Rights Act. It guaranteed "equal employment opportunity," which was defined to "include all the compensation, terms, conditions, and privileges of employment." S. Rep. No. 867, 88th Cong., 2d Sess., 24 (1964).

404 U. S. 157, 178 (1971),[8] may not be afforded in a manner contrary to Title VII.

Several allegations in petitioner's complaint would support the conclusion that the opportunity to become a partner was part and parcel of an associate's status as an employee at respondent's firm, independent of any allegation that such an opportunity was included in associates' employment contracts. Petitioner alleges that respondent's associates could regularly expect to be considered for partnership at the end of their "apprenticeships," and it appears that lawyers outside the firm were not routinely so considered.[9] Thus, the benefit of partnership consideration was allegedly linked directly with an associate's status as an employee, and this linkage was far more than coincidental: petitioner alleges that respondent explicitly used the prospect of ultimate partnership to induce young lawyers to join the firm. Indeed, the importance of the partnership decision to a lawyer's status as an associate is underscored by the allegation that associates' employment is terminated if they are not elected to become partners. These allegations, if proved at trial, would suffice to show that partnership consideration was a term, condition, or privilege of an associate's employment at respondent's firm, and accordingly that partnership consideration must be without regard to sex.

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[8] *Chemical & Alkali Workers* pertains to § 8(d) of the National Labor Relations Act (NLRA), which describes the obligation of employers and unions to meet and confer regarding "wages, hours, and other terms and conditions of employment." 61 Stat. 142, as amended, 29 U. S. C. § 158(d). The meaning of this analogous language sheds light on the Title VII provision at issue here. We have drawn analogies to the NLRA in other Title VII contexts, see *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976), and have noted that certain sections of Title VII were expressly patterned after the NLRA, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419 (1975).

[9] Respondent's own submissions indicate that most of respondent's partners in fact were selected from the ranks of associates who had spent their entire prepartnership legal careers (excluding judicial clerkships) with the firm. See App. 45.

B

Respondent contends that advancement to partnership may never qualify as a term, condition, or privilege of employment for purposes of Title VII. First, respondent asserts that elevation to partnership entails a change in status from an "employee" to an "employer." However, even if respondent is correct that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply and preclude discrimination on the basis of sex. The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment. It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates. *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1079 (1983) (opinion of MARSHALL, J.). Accordingly, nothing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of the statute. See *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123, 128–129 (SDNY 1977).

Second, respondent argues that Title VII categorically exempts partnership decisions from scrutiny. However, respondent points to nothing in the statute or the legislative history that would support such a *per se* exemption.[10] When

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[10] The only legislative history respondent offers to support its position is Senator Cotton's defense of an unsuccessful amendment to limit Title VII to businesses with 100 or more employees. In this connection the Senator stated:

"[W]hen a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces

Congress wanted to grant an employer complete immunity, it expressly did so.[11]

Third, respondent argues that application of Title VII in this case would infringe constitutional rights of expression or association. Although we have recognized that the activities of lawyers may make a "distinctive contribution . . . to the ideas and beliefs of our society," *NAACP* v. *Button*, 371 U. S. 415, 431 (1963), respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood* v. *Harrison*, 413 U. S. 455, 470 (1973). There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union. *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94 (1945).

III

We conclude that petitioner's complaint states a claim cognizable under Title VII. Petitioner therefore is entitled to

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when he selects a wife." 110 Cong. Rec. 13085 (1964); accord, 118 Cong. Rec. 1524, 2391 (1972).

Because Senator Cotton's amendment failed, it is unclear to what extent Congress shared his concerns about selecting partners. In any event, his views hardly conflict with our narrow holding today: that in appropriate circumstances partnership consideration may qualify as a term, condition, or privilege of a person's employment with an employer large enough to be covered by Title VII.

[11] For example, Congress expressly exempted Indian tribes and certain agencies of the District of Columbia, 42 U. S. C. § 2000e(b)(1), small businesses and bona fide private membership clubs, § 2000e(b)(2), and certain employees of religious organizations, § 2000e–1. Congress initially exempted certain employees of educational institutions, § 702, 78 Stat. 255, but later revoked that exemption, Equal Employment Opportunity Act of 1972, § 3, 86 Stat. 103.

her day in court to prove her allegations. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

I join the Court's opinion holding that petitioner's complaint alleges a violation of Title VII and that the motion to dismiss should not have been granted. Petitioner's complaint avers that the law firm violated its promise that she would be considered for partnership on a "fair and equal basis" within the time span that associates generally are so considered.[1] Petitioner is entitled to the opportunity to prove these averments.

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates.[2] The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects.[3] The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement, see, *e. g.*, Memorandum of Agreement, King & Spalding, App. 153–164 (respondent's partnership agreement), or consent among the partners.

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[1] Law firms normally require a period of associateship as a prerequisite to being eligible to "make" partner. This need not be an inflexible period, as firms may vary from the norm and admit to partnership earlier than, or subsequent to, the customary period of service. Also, as the complaint recognizes, many firms make annual evaluations of the performances of associates, and usually are free to terminate employment on the basis of these evaluations.

[2] Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as "partners." Law partnerships usually have many of the characteristics that I describe generally here.

[3] These decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of billing; accept-

Respondent contends that for these reasons application of Title VII to the decision whether to admit petitioner to the firm implicates the constitutional right to association. But here it is alleged that respondent as an employer is obligated by contract to consider petitioner for partnership on equal terms without regard to sex. I agree that enforcement of this obligation, voluntarily assumed, would impair no right of association.[4]

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ance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm. Divisions of partnership profits, unlike shareholders' rights to dividends, involve judgments as to each partner's contribution to the reputation and success of the firm. This is true whether the partner's participation in profits is measured in terms of points or percentages, combinations of salaries and points, salaries and bonuses, and possibly in other ways.

[4] The Court's opinion properly reminds us that "invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Ante*, at 78. This is not to say, however, that enforcement of laws that ban discrimination will always be without cost to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues. See generally Fallon, To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination, 60 Boston Univ. L. Rev. 815, 844–860 (1980). Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendments. Cf. *NAACP* v. *Button*, 371 U. S. 415 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958).

With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of association. For example, the Courts of Appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions. *Lieberman* v. *Gant*, 630 F. 2d 60, 67–68 (CA2 1980); *Kunda* v. *Muhlenberg*

In admission decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant. The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated to race or sex. This is demonstrated by the success of women and minorities in law schools, in the practice of law, on the bench, and in positions of community, state, and national leadership. Law firms—and, of course, society—are the better for these changes.

College, 621 F. 2d 532, 547–548 (CA3 1980). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 311–315 (1978) (opinion of JUSTICE POWELL). The present case, before us on a motion to dismiss for lack of subject-matter jurisdiction, does not present such an issue.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. *v.* WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1608. Argued February 29, 1984—Decided May 22, 1984

Pursuant to an Alaska statute, the Alaska Department of Natural Resources published a notice that it would sell certain timber from state lands under a contract requiring "primary manufacture" (partial processing) of the timber within Alaska before the successful bidder could ship it outside of the State. Petitioner, an Alaska corporation engaged in the business of purchasing timber and shipping the logs into foreign commerce, does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the sale of state-owned timber involved here, petitioner filed an action in Federal District Court seeking an injunction on the ground that the requirement violated the negative implications of the Commerce Clause under which States may not enact laws imposing substantial burdens on interstate and foreign commerce unless authorized by Congress. The District Court agreed and issued an injunction, but the Court of Appeals reversed. That court found it unnecessary to reach the question whether, standing alone, the requirement would violate the Commerce Clause, because it found implicit congressional authorization in the federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska.

Held: The judgment is reversed, and the case is remanded.

693 F. 2d 890, reversed and remanded.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that Congress has authorized Alaska's primary-manufacture requirement. Although there is a clearly delineated federal policy, endorsed by Congress, imposing primary-manufacture requirements as to timber taken from *federal* lands in Alaska for export from the United States or for shipment to other States, in order for a state regulation to be removed from the reach of the dormant Commerce Clause as being authorized by Congress, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. The fact that Alaska's policy appears to be consistent with federal policy—or even that state policy furthers the goals that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; it cannot be inferred from that fact that it intended to authorize a similar policy with respect to state lands. Pp. 87–93.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts III and IV, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 101. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 101. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 101. MARSHALL, J., took no part in the decision of the case.

LeRoy E. DeVeaux argued the cause for petitioner. With him on the briefs were *Richard L. Crabtree, Donald I. Baker, Karen L. Grimm,* and *Erwin N. Griswold.*

Kathryn A. Oberly argued the cause for the United States as *amicus curiae* in support of petitioner. With her on the brief were *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne,* and *Dirk D. Snel.*

Ronald W. Lorensen, Deputy Attorney General of Alaska, argued the cause for respondents. On the brief were *Norman C. Gorsuch,* Attorney General, and *Michael J. Frank* and *Michele D. Brown,* Assistant Attorneys General.*

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

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*[*James H. Clarke*] filed a brief for the Pacific Rim Trade Association et al. as *amici curiae* urging reversal.

C. Dean Little filed a brief for Northwest Independent Forest Manufacturers et al. as *amici curiae* urging affirmance.

We granted certiorari in this case to review a decision of the Court of Appeals for the Ninth Circuit that held that Alaska's requirement that timber taken from state lands be processed within the State prior to export was "implicitly authorized" by Congress and therefore does not violate the Commerce Clause. 464 U. S. 890 (1983). We hold that it was not authorized and reverse the judgment of the Court of Appeals.

I

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin. Code § 76.130 (1974), that "[p]rimary manufacture within the State of Alaska will be required as a special provision of the contract."[1] App. 35a. Under the primary-manufacture requirement, the successful bidder must partially process the timber prior to shipping it outside of the State.[2] The requirement is imposed by contract and

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[1] The proposed contract, which the successful bidder on the timber sale would have been required to sign, provided:

"*Section 68. Primary Manufacture.* Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

"Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974."

[2] 11 Alaska Admin. Code § 76.130 (1974) (repealed 1982), which authorized the contractual provision in question, provided:

"PRIMARY MANUFACTURE

"(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

"(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

"(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks does not limit the export of unprocessed timber not owned by the State. The stated purpose of the requirement is to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis." Governor's Policy Statement, App. 28a. When it imposes the requirement, the State charges a significantly lower price for the timber than it otherwise would. Brief for Respondents 6–7.

The major method of complying with the primary-manufacture requirement is to convert the logs into *cants*, which are logs slabbed on at least one side. In order to satisfy the Alaska requirement, cants must be either sawed to a maximum thickness of 12 inches or squared on four sides along their entire length.[3]

Petitioner, South-Central Timber Development, Inc., is an Alaska corporation engaged in the business of purchasing standing timber, logging the timber, and shipping the logs into foreign commerce, almost exclusively to Japan.[4] It

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can be processed by resaw equipment of the type customarily used in log processing plants; or

"(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

"(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture."

The local-processing requirement is now authorized by Alaska Admin. Code §§ 71.230, 71.910 (1982).

[3] Current regulations require that the cants be no thicker than 8¾ inches unless slabs are taken from all four sides. 11 Alaska Admin. Code § 71.910 (1982).

[4] Apparently, there is virtually no interstate market in Alaska timber because of the high shipping costs associated with shipment between

does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the Icy Cape sale, it brought an action in Federal District Court seeking an injunction, arguing that the requirement violated the negative implications of the Commerce Clause.[5] The District Court

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American ports. Consequently, over 90% of Alaska timber is exported to Japan. Brief for Petitioner 14, n. 14.

[5] Although it would appear at first blush that it would be economically more efficient to have the primary processing take place within Alaska, that is apparently not the case. Material appearing in the record suggests that the slabs removed from the log in the process of making cants are often quite valuable, but apparently cannot be used and are burned. Record, Exh. 11, p. 63. It appears that because of the wasted wood, cants are actually worth *less* than the unprocessed logs. An affidavit of a vice president of South-Central states in part:

"5. It is also my observation that within Alaska there is absolutely no market for domestic resawing of 'cant' or 'square' manufactured to State of Alaska specifications. In other words, a cant or square manufactured in Alaska would be virtually unsaleable within local Alaska sawmill markets. The reasons are:

"A. Any sawmill would prefer round logs for its sawmill operations and the small volume of round logs required would be readily available locally.

"B. Round logs are preferable because they can be stored in the water and moved in the water, whereas cants must be transported on land.

"C. Once a log is placed on the sawmill carriage and the costs of getting it there have been incurred, it produces more lumber for the costs involved than does a cant.

"D. Also the round log is much less subject to deterioration from weather and outside conditions.

"6. South-Central had experience with attempting to make a sale of cants inside the State of Alaska. We had some cants at Jakalof Bay which were manufactured to State specifications, but which were not loaded aboard ships during that season. We attempted to market those cants to a sawmill in Anchorage, but found that just costs of transporting the cants from Jakalof Bay to Anchorage exceeded the highest possible sales price of the cants. Accordingly no sale was made.

"7. Based on the above statements and my observations of the Alaska timber industry, it is my firm conclusion that a cant or a square manufactured to State of Alaska primary manufacture specifications is marketable agreed and issued an injunction. *South-Central Timber Development, Inc.* v. *LeResche*, 511 F. Supp. 139 (Alaska 1981). The Court of Appeals for the Ninth Circuit reversed, finding it unnecessary to reach the question whether, standing alone, the requirement would violate the Commerce Clause, because it found implicit congressional authorization in the federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska. *South-Central Timber Development, Inc.* v. *LeResche*, 693 F. 2d 890 (1982).

We must first decide whether the court was correct in concluding that Congress has authorized the challenged requirement. If Congress has not, we must respond to respondents' submission that we should affirm the judgment on two grounds not reached by the Court of Appeals: (1) whether in the absence of congressional approval Alaska's requirement is permissible because Alaska is acting as a market participant, rather than as a market regulator; and (2), if not, whether the local-processing requirement is forbidden by the Commerce Clause.

II

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980); *Hughes* v. *Oklahoma*, 441 U. S. 322, 326 (1979); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–538 (1949); *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). It is equally clear that Congress may "redefine the distribution of power over interstate commerce" by "permit[ting] the

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only in foreign commerce and cannot be sold for use within Alaska. It is also my firm conclusion that no sawmill in Alaska will manufacture a cant or square for any domestic Alaska market." App. 121a–122a.

states to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769 (1945). See also *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U. S. 941, 958–960 (1982); *New England Power Co.* v. *New Hampshire,* 455 U. S. 331 (1982); *Western & Southern Life Insurance Co.* v. *State Board of Equalization,* 451 U. S. 648, 652–655 (1981); *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408 (1946). The Court of Appeals held that Congress had done just that by consistently endorsing primary-manufacture requirements on timber taken from *federal* land. 693 F. 2d, at 893. Although the court recognized that cases of this Court have spoken in terms of *express* approval by Congress, it stated:

> "But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." *Ibid.*

We agree that federal policy with respect to federal land is "clearly delineated," but the Court of Appeals was incorrect in concluding either that there is a clearly delineated federal policy approving Alaska's local-processing requirement or that Alaska's policy with respect to its timber lands is authorized by the existence of a "parallel" federal policy with respect to federal lands.

Since 1928, the Secretary of Agriculture has restricted the export of unprocessed timber cut from National Forest lands in Alaska. The current regulation, upon which the State places heavy reliance, provides:

> "Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is neces-

sary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." 36 CFR § 223.10(c) (1983).

From 1969 to 1973, Congress imposed a maximum export limitation of 350 million board-feet of unprocessed timber from federal lands lying west of the 100th meridian (a line running from central North Dakota through central Texas). 16 U. S. C. § 617(a). Beginning in 1973, Congress imposed, by way of a series of annual riders to appropriation Acts, a complete ban on foreign exports of unprocessed logs from western lands except those within Alaska. See, *e. g.*, Pub. L. 96–126, Tit. III, § 301, 93 Stat. 979. These riders limit only foreign exports and do not require in-state processing before the timber may be sold in domestic interstate commerce. The export limitation with respect to federal land in Alaska, rather than being imposed by statute, was imposed by the above-quoted regulation, and applies to exports to other States, as well as to foreign exports.

Alaska argues that federal statutes and regulations demonstrate an affirmative expression of approval of its primary-manufacture requirement for three reasons: (1) federal timber export policy has, since 1928, treated federal timber land in Alaska differently from that in other States; (2) the Federal Government has specifically tailored its policies to ensure development of wood-processing capacity for utilization of timber from the National Forests; and (3) the regulation forbidding without prior approval the export from Alaska of unprocessed timber or its shipment to other States demonstrates that it is the Alaska wood-processing industry in particular, not the domestic wood-processing industry generally, that has been the object of federal concern.

Acceptance of Alaska's three factual propositions does not mandate acceptance of its conclusion. Neither South-

Central nor the United States[6] challenges the existence of a federal policy to restrict the out-of-state shipment of unprocessed Alaska timber from federal lands. They challenge only the derivation from that policy of an affirmative expression of federal approval of a parallel policy with respect to state timber. They argue that our cases dealing with congressional authorization of otherwise impermissible state interference with interstate commerce have required an "express" statement of such authorization, and that no such authorization may be implied.

It is true that most of our cases have looked for an express statement of congressional policy prior to finding that state regulation is permissible. For example, in *Sporhase* v. *Nebraska ex rel. Douglas, supra,* the Court declined to find congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of interstate compacts that demonstrated Congress' deference to state water law. We noted that on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been "expressly stated." 458 U. S., at 960. Similarly, in *New England Power Co.* v. *New Hampshire,* 455 U. S. 331 (1982), we rejected a claim by the State of New Hampshire that its restriction on the interstate flow of privately owned and produced electricity was authorized by §201(b) of the Federal Power Act. That section provides that the Act "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U. S. C. §824(b). We found nothing in the statute or legislative history "evinc[ing] a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" 455 U. S., at 341

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[6] The United States appears as *amicus curiae* in support of the position of South-Central.

(quoting *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295, 304 (1953)).

Alaska relies in large part on this Court's recent opinion in *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983), for its "implicit approval" theory. At issue in *White* was an executive order issued by the Mayor of Boston requiring all construction projects funded by the city or by funds that the city had authority to administer, to be performed by a work force consisting of at least 50% residents of the city. A number of the projects were funded in part with federal Urban Development Action Grants. The Court held that insofar as the city expended its own funds on the projects, it was a market participant unconstrained by the dormant Commerce Clause; insofar as the city expended federal funds, "the order was affirmatively sanctioned by the pertinent regulations of those programs." *Id.*, at 215. Alaska relies on the Court's statements in *White* that the federal regulations "affirmatively permit" and "affirmatively sanctio[n]" the executive order and that the order "sounds a harmonious note" with the federal regulations, and it finds significance in the fact that the Court did not use the words "expressly stated."

Rather than supporting the position of the State, we believe that *White* undermines it. If approval of state burdens on commerce could be implied from parallel federal policy, the Court would have had no reason to rely upon the market-participant doctrine to uphold the executive order. Instead, the order could have been upheld as being in harmony with federal policy as expressed in regulations governing the expenditure of federal funds.

There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not, as Alaska asserts, merely a wooden formalism. The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325 (1979). Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 185, n. 2 (1938); see also *Southern Pacific Co.* v. *Arizona*, 325 U. S., at 767–768, n. 2. On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.[7]

The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands.[8] Accordingly, we reverse the contrary judgment of the Court of Appeals.

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[7] The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.

III

We now turn to the issues left unresolved by the Court of Appeals. The first of these issues is whether Alaska's restrictions on export of unprocessed timber from state-owned lands are exempt from Commerce Clause scrutiny under the "market-participant doctrine."

Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities. See *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S., at 206–208; *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 436–437 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810 (1976). The precise contours of the market-participant doctrine have yet to be established, however, the doctrine having been applied in only three cases of this Court to date.

The first of the cases, *Hughes* v. *Alexandria Scrap Corp.*, *supra*, involved a Maryland program designed to reduce the number of junked automobiles in the State. A "bounty" was established on Maryland-licensed junk cars, and the State imposed more stringent documentation requirements on out-of-state scrap processors than on in-state ones. The Court rejected a Commerce Clause attack on the program, although it noted that under traditional Commerce Clause analysis the program might well be invalid because it had the effect of reducing the flow of goods in interstate commerce. *Id.*, at 805. The Court concluded that Maryland's action was not "the kind of action with which the Commerce Clause is concerned," *ibid.*, because "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnote omitted).

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[8] It is for that reason that we need not resolve the dispute between the parties about whether Congress' purpose in applying the primary-manufacture requirement to federal lands was for the purpose of encouraging the Alaska wood-processing industry or whether it was merely to ensure adequate processing capacity to deal with federal timber. In either event, no congressional intent to permit a primary-manufacture requirement by the State appears.

It is worthy of note, although we do not rely upon it, that Congress has been requested to authorize the imposition by States of in-state processing requirements but has declined to do so. Prohibit Export of Unprocessed Timber: Hearing on H. R. 639 before the Subcommittee on Forests, Family Farms, and Energy of the House Committee on Agriculture, 97th Cong., 1st Sess., 18–19 (1981).

In *Reeves, Inc.* v. *Stake, supra*, the Court upheld a South Dakota policy of restricting the sale of cement from a state-owned plant to state residents, declaring that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." *Id.*, at 436. The Court relied upon "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.*, at 438–439 (quoting *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919)). In essence, the Court recognized the principle that the Commerce Clause places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods.

The most recent of this Court's cases developing the market-participant doctrine is *White* v. *Massachusetts Council of Construction Employers, Inc., supra*, in which the Court sustained against a Commerce Clause challenge an executive order of the Mayor of Boston that required all construction projects funded in whole or in part by city funds or city-administered funds to be performed by a work force of at least 50% city residents. The Court rejected the argument that the city was not entitled to the protection of the doctrine because the order had the effect of regulating employment contracts between public contractors and their employees. *Id.*, at 211, n. 7. Recognizing that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," the Court found it unnecessary to define those limits because "[e]veryone affected by the order [was], in a substantial if informal sense, 'working for the city.'" *Ibid.* The fact that the employees were "working for the city" was "crucial" to the market-participant analysis in *White.* *United Building and Construction Trades Council* v. *Mayor of Camden,* 465 U. S. 208, 219 (1984).

The State of Alaska contends that its primary-manufacture requirement fits squarely within the market-participant doctrine, arguing that "Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap.*" Brief for Respondents 24. However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing in an amount "roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives." *Ibid.* If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or forgoing the benefits of the subsidy and exporting unprocessed timber. Under the Alaska requirement, however, the choice is made for him: if he buys timber from the State he is not free to take the timber out of state prior to processing.

The State also would have us find *Reeves* controlling. It states that "*Reeves* made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber." Brief for Respondents 25. Such an unrestrained reading of *Reeves* is unwarranted. Although the Court in *Reeves* did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not—and did not purport to—sanction the imposition of any terms that the State might desire. For example, the Court expressly noted in *Reeves* that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged," 447 U. S., at 438, n. 9; that a natural resource "like coal, timber, wild game, or minerals," was not involved, but instead the cement was "the end product of a complex process whereby a costly physical plant and human labor act on raw materials," *id.*, at 443–444; and that South Dakota did not bar resale of South Dakota cement to out-of-state purchasers, *id.*, at 444, n. 17. In this case, all three of the elements that were not present in *Reeves*—foreign commerce, a natural resource, and restrictions on resale—are present.

Finally, Alaska argues that since the Court in *White* upheld a requirement that reached beyond "the boundary of formal privity of contract," 460 U. S., at 211, n. 7, then, *a fortiori*, the primary-manufacture requirement is permissible, because the State is not regulating contracts for resale of timber or regulating the buying and selling of timber, but is instead "a seller of timber, pure and simple." Brief for Respondents 28. Yet it is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.[9]

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[9] The facts of the present case resemble closely the facts of *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928), in which the Court struck down a Louisiana law prohibiting export from the State of any shrimp from which the heads and hulls had not been removed. The Court

That privity of contract is not always the outer boundary of permissible state activity does not necessarily mean that the Commerce Clause has no application within the boundary of formal privity. The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." *White* v. *Massachusetts Council of Construction Workers, Inc.*, 460 U. S., at 211, n. 7. Contrary to the State's contention, the doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. See Tr. of Oral Arg. 35.

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.[10] Unless the

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rejected the claim that the fact that the shrimp were owned by the State authorized the State to impose such limitations. Although not directly controlling here, because of the Court's recognition that "the State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people," *id.*, at 11, the Court's reasoning is relevant. The Court noted that the State might have retained the shrimp for consumption and use within its borders, but "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." *Id.*, at 13.

[10] The view of the market-participant doctrine expressed by JUSTICE REHNQUIST, *post*, at 102–103, would validate under the Commerce Clause any contractual condition that the State had the economic power to impose, without regard to the relationship of the subject matter of the contract and the condition imposed. If that were the law, it would have been irrelevant that the employees in *White* v. *Massachusetts Council of Construction Workers, Inc.*, 460 U. S. 204 (1983), were in effect "working for the city." *Id.*, at 211, n. 7. If the only question were whether the condition is im-

"market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

At the heart of the dispute in this case is disagreement over the definition of the market. Alaska contends that it is participating in the processed timber market, although it acknowledges that it participates in no way in the actual processing. *Id.*, at 34. South-Central argues, on the other hand, that although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. We agree with the latter position.

There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands. First, simply as a matter of intuition a state market participant has a greater interest as a "private trader" in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them. The common law recognized such a notion in the doctrine of restraints on alienation. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 404 (1911); but cf. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 53, n. 21 (1977). Similarly, the antitrust laws place limits on vertical restraints. It is no defense in an action charging vertical trade restraints that the same end could be achieved through vertical integration; if it were, there would be virtually no antitrust scrutiny of vertical arrangements. We reject the contention that a State's action as a market regulator may be upheld against Commerce Clause challenge on the ground that the State could

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posed by contract, a residency requirement could have been imposed with respect to the work force on all projects of any employer doing business with the city.

achieve the same end as a market participant. We therefore find it unimportant for present purposes that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy. See Tr. of Oral Arg. 34, 37, 45.

Second, downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract.[11] In sum, the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant.

IV

Finally, the State argues that even if we find that Congress did not authorize the processing restriction, and even if we conclude that its actions do not qualify for the market-participant exception, the restriction does not substantially burden interstate or foreign commerce under ordinary Commerce Clause principles. We need not labor long over that contention.

Viewed as a naked restraint on export of unprocessed logs, there is little question that the processing requirement cannot survive scrutiny under the precedents of the Court. For example, in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), we invalidated a requirement of the State of Arizona that all Arizona cantaloupes be packed within the State. The Court noted that the State's purpose was "to protect and enhance the reputation of growers within the State," a purpose we described as "surely legitimate." *Id.*, at 143. We observed:

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[11] This is not to say that the State could evade the reasoning of this opinion by merely including a provision in its contract that title does not pass until the processing is complete. It is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis.

> "[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; *Johnson* v. *Haydel*, 278 U. S. 16; *Toomer* v. *Witsell*, 334 U. S. 385." *Id.*, at 145.

We held that if the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment, then, *a fortiori*, it forbids a State to impose such a requirement to enhance the reputation of its producers. Because of the protectionist nature of Alaska's local-processing requirement and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual *per se* invalidity of laws that "bloc[k] the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).

We are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that "the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 285 (1976); see also *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979). In light of the substantial attention given by Congress to the subject of export restrictions on unprocessed timber, it would be peculiarly inappropriate to permit state regulation of the subject. See Prohibit Export of Unprocessed Timber: Hearing on H. R. 639 before the Subcommittee on Forests, Family Farms, and Energy of the House Committee on Agriculture, 97th Cong., 1st Sess. (1981).

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with the opinion of this Court.

It is so ordered.

JUSTICE MARSHALL took no part in the decision of this case.

JUSTICE BRENNAN, concurring.

I join JUSTICE WHITE's opinion in full because I believe Alaska's in-state processing requirement constitutes market regulation that is not authorized by Congress. In my view, JUSTICE WHITE's treatment of the market-participant doctrine and the response of JUSTICE REHNQUIST point up the inherent weakness of the doctrine. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 817 (1976) (BRENNAN, J., dissenting).

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

I join Parts I and II of JUSTICE WHITE's opinion. I would remand the case to the Court of Appeals to allow that court to consider whether Alaska was acting as a "market participant" and whether Alaska's primary-manufacture requirement substantially burdened interstate commerce under the holding of *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970).

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

In my view, the line of distinction drawn in the plurality opinion between the State as market participant and the

State as market regulator is both artificial and unconvincing. The plurality draws this line "simply as a matter of intuition," *ante*, at 98, but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause.* For example, the plurality complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber-processing market, *ibid.*, a classic example of a tying arrangement. See, *e. g.*, *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 619–621 (1977). And the plurality cites the common-law doctrine of restraints on alienation and the antitrust limits on vertical restraints in dismissing the State's claim that it could accomplish exactly the same result in other ways. *Ante*, at 98–99.

Perhaps the State's actions do raise antitrust problems. But what the plurality overlooks is that the antitrust laws apply to a State only when it is acting as a market participant. See, *e. g.*, *Jefferson County Pharmaceutical Assn., Inc.* v. *Abbott Laboratories*, 460 U. S. 150, 154 (1983) (state action immunity "does not apply where a State has chosen to compete in the private retail market"). When the State acts as a market regulator, it is immune from antitrust scrutiny. See *Parker* v. *Brown*, 317 U. S. 341, 350–352 (1943). Of course, the line of distinction in cases under the Commerce Clause need not necessarily parallel the line drawn in antitrust law. But the plurality can hardly justify placing Alaska in the market-regulator category, in this Commerce Clause case, by relying on antitrust cases that are relevant only if the State is a market participant.

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*The plurality does offer one other reason for its demarcation of the boundary between these two concepts.

> "[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity." *Ante*, at 99.

But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

The contractual term at issue here no more transforms Alaska's sale of timber into "regulation" of the processing industry than the resident-hiring preference imposed by the city of Boston in *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983), constituted regulation of the construction industry. Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Under existing precedent, the State could accomplish that same result in any number of ways. For example, the State could choose to sell its timber only to those companies that maintain active primary-processing plants in Alaska. *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980). Or the State could directly subsidize the primary-processing industry within the State. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). The State could even pay to have the logs processed and then enter the market only to sell processed logs. See *ante*, at 99. It seems to me unduly formalistic to conclude that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause.

For these reasons, I would affirm the judgment of the Court of Appeals.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* DAY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-1371. Argued December 5, 1983—Decided May 22, 1984

The Social Security Act (Act) and implementing regulations provide a four-step process for the administrative review and adjudication of disputed disability benefit claims under Title II of the Act. First, a state agency determines whether the claimant has a disability and the date it began or ceased. Second, if the claimant is dissatisfied with that determination, he may request a *de novo* reconsideration and in some cases a full evidentiary hearing. Third, if the claimant receives an adverse reconsideration determination, he is entitled to an evidentiary hearing and *de novo* review by an administrative law judge. Finally, if the claimant is dissatisfied with the administrative law judge's decision, he may appeal to the Appeals Council of the Department of Health and Human Services (HHS). Respondents brought an action in Federal District Court on behalf of a statewide class of claimants in Vermont, seeking declaratory and injunctive relief from delays encountered in steps two and three that allegedly violated their right under 42 U. S. C. § 405(b) (1976 ed., Supp. V) to a hearing within a reasonable time. Holding that delays of more than 90 days in making reconsideration determinations, and delays of more than 90 days in granting a hearing request, were unreasonable and violated claimants' statutory rights, the District Court issued an injunction in favor of the statewide class requiring the Secretary of HHS in the future to issue reconsideration determinations within 90 days of requests for reconsideration, to conduct hearings within 90 days of requests for hearings, and to pay interim benefits to any claimant who did not receive a reconsideration determination or hearing within 180 days of the request for reconsideration or who did not receive a hearing within 90 days of the hearing request. The Court of Appeals affirmed.

Held: The District Court's injunction constituted an unwarranted judicial intrusion into the pervasively regulated area of claims adjudication under Title II. The legislative history shows that Congress, in striking the balance between the need for timely disability determinations and the need to ensure the accuracy and consistency of such determinations in the face of heavy workloads and limited agency resources, has concluded that mandatory deadlines for adjudication of disputed disability claims are inconsistent with the Act's primary objectives. In light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have been contemplated that courts should have authority to impose judicially the very deadlines Congress repeatedly has rejected. Pp. 111–118.

685 F. 2d 19, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 120.

Assistant Attorney General McGrath argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Geller*, *Edwin S. Kneedler*, and *John F. Cordes*.

Richard H. Munzing argued the cause for respondents. With him on the brief was *Henry A. Freedman*.*

JUSTICE POWELL delivered the opinion of the Court.

The question presented is the validity of an injunction issued on behalf of a statewide class that requires the Secretary of Health and Human Services to adjudicate all future disputed disability claims under Title II of the Social Security Act, 42 U. S. C. § 401 *et seq.*, according to judicially established deadlines and to pay interim benefits in all cases of noncompliance with those deadlines.

I

Title II of the Social Security Act (Act) was passed in 1935. 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.* Among other things, it provides for the payment of disability insur-

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*Briefs of *amici curiae* urging affirmance were filed for the Alliance of Social Security Disability Recipients et al. by *Eileen P. Sweeny* and *Bonnie M. Milstein;* and for the City of New York by *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner*.

ance benefits to those whose disability prevents them from pursuing gainful employment. 42 U. S. C. § 423.[1] Disability benefits also are payable under the Supplemental Security Income (SSI) program established by Title XVI of the Act, 76 Stat. 197, as amended, 42 U. S. C. § 1381. The disability programs administered under Titles II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U. S. 389, 399 (1971). Approximately two million disability claims were filed under these two Titles in fiscal year 1983.[2] Over 320,000 of these claims must be heard by some 800 administrative law judges each year.[3] To facilitate the orderly and sympathetic administration of the disability program of Title II, the Secretary and Congress have established an unusually protective four-step process for the review and adjudication of disputed claims. First, a state agency determines whether the claimant has a disability and the date the disability began or ceased.[4] 42 U. S. C. § 421(a); 20 CFR § 404.1503 (1983). Second, if the claimant is dissatisfied with that determination, he may request reconsideration of the determination. This involves a *de novo* reconsideration of the disability claim by the state agency, and in some cases a full evidentiary hearing. §§404.907–404.921. Additional evidence may be submitted at this stage, either on the request of the claimant or by order of the agency. Third, if the claimant receives an adverse reconsideration determination, he is entitled by statute to an evidentiary hearing and to a *de novo* review by an Administrative Law Judge (ALJ). 42 U. S. C. §405(b); 20 CFR §§404.929–404.961 (1983). Finally, if the claimant is dissatisfied with the decision of the ALJ, he may take an appeal to the Appeals Council of the Department of Health and Human Services (HHS).[5] §§404.967–404.983. These four steps exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court. 42 U. S. C. §405(g).

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[1] Section 423(d)(1) defines "disability" as:

"(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Any disability benefits payable under § 423 are paid out of the Federal Disability Insurance Trust Fund, which is funded by payroll taxes. 42 U. S. C. § 401(b).

[2] Social Security Administration, 1983 Annual Report to Congress 43–44 (1983).

[3] U. S. Dept. of Health and Human Services, Office of Hearings and Appeals, Key Workload Indicators 1, 16 (May 1983) (hereinafter Key Workload Indicators). In May 1983, the average number of cases pending per administrative law judge stood at a record 221. *Id.*, at 1.

[4] The state agency acts under the authority and control of the Secretary. See 42 U. S. C. § 421(a).

In this class action, the named plaintiffs sought declaratory and injunctive relief from delays encountered in steps two and three above. The action was initiated by Leon Day in November 1978 after his disability benefits were terminated and he suffered substantial delays in obtaining a reconsideration determination and in securing a hearing before an ALJ.[6] After suffering similar delays, Amedie Maurais intervened in the action.[7] On June 14, 1979, the District Court certified a statewide class consisting of:

> "All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the defendant that no disability

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[5] New material evidence may be submitted to the Appeals Council. The Council then reviews all the evidence and will reverse the ALJ's determination only if it finds that the determination is "contrary to the weight of the evidence currently in the record." 20 CFR §404.970(b) (1983).

[6] Day was forced to wait 167 days for a reconsideration determination. He received a hearing before the ALJ 173 days after his hearing request. App. to Pet. for Cert. 13a–14a.

[7] Maurais waited 215 days for a reconsideration determination after his disability benefits were terminated. He was given a hearing before an ALJ 65 days after his hearing request. *Id.*, at 14a.

> exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings." App. to Pet. for Cert. 12a, n. 1.

Plaintiffs argued before the District Court that the delays they had experienced violated their statutory right under 42 U. S. C. § 405(b) (1976 ed., Supp. V) to a hearing within a reasonable time.[8] Both parties submitted the case to the District Court on motions for summary judgment. On the basis of the undisputed evidence, the District Court held that, as to all claimants for Title II disability benefits in Vermont, delays of more than 90 days from a request for hearing before an ALJ to the hearing itself were unreasonable.[9] It granted partial summary judgment to the plaintiff class on that issue in December 1979.

After the submission of additional evidence, the District Court considered motions for summary judgment concerning the reasonableness of delays in the reconsideration process. The additional evidence also was undisputed. It consisted of factual summaries of 77 randomly selected disability cases submitted by the Secretary. The District Court noted that the "summaries support the positions of both parties. They show the reconsideration process is often time consuming and complex. They also show that the process is replete with unexplained delay; other requests are processed with commendable dispatch." App. to Pet. for Cert. 25a. In 27 of the 77 cases, reconsideration determinations took longer than 90 days. In each of these 27, the District Court concluded that the delays were caused by agency inefficiencies and were not justified by the "necessary steps in the reconsideration process." *Id.*, at 28a. On the basis of this survey, the District Court concluded that, as a rule, delays of more than 90 days in making reconsideration determinations were unreasonable and violated the claimant's statutory rights.[10] In August 1981, the District Court granted summary judgment for respondents on the reconsideration aspect of the case.

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[8] That section provides that after any unfavorable determination of disability, the claimant, on request, shall be entitled to "reasonable notice and opportunity for a hearing with respect to such decision."

[9] The evidence submitted by the Government showed that 57% of the hearings requested in Vermont after January 1978 were scheduled within 90 days, with a range of delays varying between two and nine months. *Id.*, at 15a. The District Court rejected the Secretary's claim that the delays were necessary to ensure quality decisions and to protect the limited resources of the Social Security program. It held that "[w]hile the SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago, we [believe] . . . that the SSA is not warranted in forcing claimants to endure such lengthy delays without benefits, while it puts its administrative appeals process in order." *Id.*, at 17a–18a.

In November 1981, the District Court issued an injunction in favor of the statewide class that "ordered and directed [the Secretary] to conclude reconsideration processing and issue reconsideration determinations within 90 days of requests for reconsideration made by claimants."[11] The injunction also required ALJs to provide hearings within 90 days after the request is made by claimants.[12] Finally, it ordered payment of interim benefits to any claimant who did not receive a reconsideration determination or hearing within 180 days of the request for reconsideration or who did not receive a hearing within 90 days of the hearing request.[13] The Court of Appeals for the Second Circuit affirmed the District Court's determination that the challenged delays violated the statute and upheld the District Court's remedial order. *Day* v. *Schweiker*, 685 F. 2d 19 (1982). We granted certiorari to consider whether it is appropriate for a federal court, without statutory authorization, to prescribe deadlines for agency adjudication of Title II disability claims and to order payment of interim benefits in the event of noncompliance. 461 U. S. 904 (1983).[14] We conclude that the legislative history makes clear that Congress, fully aware of the serious delays in resolution of disability claims, has declined to impose deadlines on the administrative process. Accordingly, we vacate the judgment below.

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[10] There is no express statutory requirement that reconsideration determinations be conducted within a reasonable time. The District Court reasoned, however, that because the reconsideration determination was an "administrative prerequisite" to an administrative hearing, "[u]nreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time." *Id.*, at 27a. That reasoning is not challenged here.

[11] The order exempted reconsideration determinations from the 90-day deadline in the following circumstances:

"(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

"(b) The claimant agrees to undergo a consultative examination when one is suggested by the defendant;

"(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

"(d) The claimant or his representative requests a delay; or,

"(e) The delay is in some other way attributable to the aggrieved claimant or his representative." *Id.*, at 33a.

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[12] The order exempted hearing requests from the 90-day deadline in the following circumstances:

"(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

"(b) The claimant or his representative requests a delay;

"(c) The claimant or his representative fails to appear for the scheduled hearing[;]

"(d) The delay is in some other way attributable to the claimant or his representative." *Id.*, at 34a.

[13] Because the District Court held that the challenged delays violated § 405(b), it did not reach plaintiffs' claims that the delays violated the Administrative Procedure Act or their due process rights under the Fourteenth Amendment.

[14] We note at the outset that the District Court had jurisdiction to consider respondents' statutory claim under 42 U. S. C. § 405(g). There are two prerequisites to § 405(g) jurisdiction. *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976); *Weinberger* v. *Salfi*, 422 U. S. 749, 763–767 (1975). The nonwaivable jurisdictional requirement that a claim for benefits shall have been presented to the Secretary has been met here. The jurisdictional requirement that administrative remedies be exhausted is waivable. In the present case, the Secretary has not challenged the sufficiency of respondents' efforts to exhaust administrative remedies. We interpret this to be a waiver by the Secretary of the exhaustion requirement under § 405(g). See *Salfi*, *supra*, at 767.

II

The Secretary does not challenge here the determination that § 405(b) requires administrative hearings to be held within a reasonable time. Nor does she challenge the District Court's determination that the delays encountered in the cases of plaintiffs Day and Maurais violated that requirement.[15] She argues only that a statewide injunction that imposes judicially prescribed deadlines on HHS for all future disability determinations is contrary to congressional intent and constitutes an abuse of the court's equitable power. She argues in the alternative that even if the injunction is appropriate, the order requiring payment of interim benefits in cases of noncompliance is not. The Secretary looks primarily to legislative history to support both arguments.

A

The Secretary correctly points out that Congress repeatedly has been made aware of the long delays associated with resolution of disputed disability claims and repeatedly has considered and expressly rejected suggestions that mandatory deadlines be imposed to cure that problem.[16] She argues that Congress expressly has balanced the need for timely disability determinations against the need to ensure quality decisions in the face of heavy and escalating workloads and limited agency resources. In striking that balance, the Secretary argues, the relevant legislative history also shows that Congress to date has determined that mandatory deadlines for agency adjudication of disputed disability claims are inconsistent with achievement of the Act's primary objectives, and that the District Court's statewide injunction flatly contradicts that legislative determination. We find this argument persuasive.

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[15] Nor do we understand the Secretary to dispute the District Court's determination that the 27 sample cases it studied evidenced statutory violations of the reasonableness requirement.

[16] The delays are not a recent development. In fiscal year 1973, the median time between hearing request and posthearing disposition was 174 days. The mean processing time reached a high in fiscal year 1976 at 288 days. At the time this action was filed in District Court (November 1978), the mean processing time was 151 days. Key Workload Indicators 1. As the District Court observed, "the [Secretary] has made admirable strides in reducing the average length of delay experienced by claimants a few years ago." See n. 9, *supra*.

Congressional concern over timely resolution of disputed disability claims under Title II began at least as early as 1975.[17] It has inspired almost annual congressional debate since that time.[18] The consistency with which Congress has expressed concern over this issue is matched by its consistent refusal to impose on the Secretary mandatory deadlines for resolution of disputed disability claims.

In 1975, the House Social Security Subcommittee held hearings on the delays encountered in resolving disputed Social Security claims,[19] and 60 Members of the House sponsored a bill imposing statutory deadlines for each step in the administrative review of disputed SSA claims.[20] Expressions of concern were voiced in both the Senate and the House over the "huge backlog of some 103,000 cases awaiting hearing" before an ALJ. S. Rep. No. 94–550, p. 3 (1975); accord H. R. Rep. No. 94–679, pp. 1–2 (1975).[21] Despite this concern, the Staff of the House Subcommittee advised against statutory deadlines because of the potential "adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect." Staff of the Subcommittee on Social Security of the House Committee on Ways and Means, Appeals Process: Areas of Possible Administrative or Legislative Action, 94th Cong., 1st Sess., 1–2 (Comm. Print 1975).[22] Congress agreed and refused to impose statutory deadlines on the Secretary.

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[17] See Delays in Social Security Appeals: Hearings before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess. (1975) (hereinafter 1975 Hearings).

[18] See, *e. g.*, Disability Insurance Program: Public Hearings before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 2d Sess., 341–343 (1976); Administrative Law Judges, HEW Executive Level Positions, and Salary Adjustment for Director of Office of Management and Budget: Hearings before the Subcommittee on Employee Ethics and Utilization of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 10–11, 16–17 (1977); Disability Insurance Program—1978: Hearings before the Subcommittee on Social Security of the House Committee on Ways and Means, 95th Cong., 2d Sess., 15–17, 97–99 (1978).

[19] See 1975 Hearings.

Bills proposing statutory deadlines have been proposed almost annually since 1975,[23] and congressional concern over the delay problem has remained high. For example, in 1980 Congress directed the Secretary to submit a report recommending the establishment of appropriate and realistic deadlines for resolution of disputed SSA claims. It ordered the

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[20] H. R. 5276, 94th Cong., 1st Sess. (1975). That bill proposed the following deadlines: 90 days for an initial determination of eligibility; 90 days for a reconsideration determination; 120 days from hearing request to posthearing decision; and 120 days for a decision by the Appeals Council.

[21] By the end of fiscal year 1975, there was a backlog of 111,169 cases, and a mean processing time of 262 days from hearing request to posthearing decision. Key Workload Indicators 1.

[22] The concern was expressed throughout the House hearings that mandatory deadlines would worsen the situation of an already overburdened staff, thereby jeopardizing the quality of agency decisions. See, *e. g.*, 1975 Hearings 8 ("Equally important as speed of processing of cases, is the question of the quality of adjudication"); *id.*, at 17 ("Heavier work loads and efforts to increase individual ALJ production place more strain on the quality of adjudication").

[23] See H. R. 12466, 94th Cong., 2d Sess. (1976); H. R. 5151, 95th Cong., 1st Sess. (1977); H. R. 12672, 95th Cong., 2d Sess. (1978); H. R. 747, 96th Cong., 1st Sess. (1979); H. R. 4775, 97th Cong., 1st Sess. (1981).

Secretary in doing so to consider "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined." Pub. L. 96–265, § 308, 94 Stat. 458, note following 42 U. S. C. § 401. The Senate Report explained that "Congress could then evaluate the recommendations for consistency with the elements it wishes to emphasize and, if needed, take further action next year." S. Rep. No. 96–408, p. 59 (1979).[24] The Secretary submitted a report in October 1980, suggesting deadlines of 150 days for reconsideration determinations and 165 days from hearing to posthearing decision, both subject to certain exceptions. U. S. Dept. of Health and Human Services, Report to Congress, Implementation of Section 308, Public Law 96–265, p. 1 (Oct. 21, 1980). The Secretary, however, cautioned Congress that budget and staff limitations and burgeoning workloads "mitigate *[sic]* against the Department meeting its proposed time limitation objectives in every instance." *Id.*, at 2. Since receiving the Secretary's report, Congress has refused to impose mandatory deadlines on the Secretary, or to direct her to promulgate them herself.

Certainly in Congress the concern that mandatory deadlines would jeopardize the quality and uniformity of agency decisions has prevailed over considerations of timeliness. In its most recent comment on the subject, the House Committee on Ways and Means expressly disapproved mandatory hearing deadlines and indicated disagreement with recent judicial decisions imposing such time restrictions. Criticizing the decision in *Blankenship* v. *Secretary of HEW*, No. C75-0185L(A) (WD Ky., May 6, 1976), which had imposed judicially prescribed hearing deadlines on the Secretary and ordered the payment of interim benefits in the event of noncompliance,[25] the Committee reported:

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[24] In requesting recommendations from the Secretary, Congress faced opposition from those who continued to press for statutory deadlines. See Disability Insurance Legislation: Hearings before the Subcommittee on Social Security of the House Committee on Ways and Means, 96th Cong., 1st Sess., 114 (1979) (statement of Dennis M. Sweeney and Laura W. S. Macklin on behalf of the Administrative Law Center, etc.) ("[T]he problem of delays in the Social Security hearing system has been before Congress repeatedly and for a number of years. . . . At this point, HEW is well aware of the problems in this area. . . . [W]e respectfully submit that this is not the time to further study the delay problem. A provision in this bill suggesting a study from HEW . . . can only be read as an invitation to further delay cleaning up the hearing process and getting rid of the unreasonable and unnecessary delays").

> "[The] Committee believes that a disability claimant is entitled to a timely hearing and decision on his appeal, but it also recognizes that the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis. . . . Establishing strict time limits for the adjudication of every case could result in incorrect determinations because time was not available to . . . reach well-reasoned decisions in difficult cases." H. R. Rep. No. 97-588, pp. 19-20 (1982).[26]

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[25] The District Court's original unpublished memorandum opinion required the Secretary to comply with a hearing request within 90 days. The Court of Appeals for the Sixth Circuit reversed that order and remanded for the Secretary to issue regulations promulgating mandatory deadlines. *Blankenship* v. *Secretary of HEW*, 587 F. 2d 329 (1978). On remand, the Secretary attempted to promulgate such regulations, but concluded that unpredictable caseloads made deadlines impossible. The Secretary then petitioned the District Court for relief from the requirement that she promulgate deadlines. The District Court refused and ordered the Secretary to promulgate the regulations. *Blankenship* v. *Secretary of Health & Human Services*, 532 F. Supp. 739 (WD Ky. 1982). The Sixth Circuit affirmed on appeal. *Blankenship* v. *Schweiker*, 722 F. 2d 1282 (1983). JUSTICE O'CONNOR has stayed the District Court's order requiring the Secretary to promulgate regulations pending our decision in this case. *Heckler* v. *Blankenship*, 465 U. S. 1301 (1984).

[26] This clear expression of congressional disapproval refutes the dissent's suggestion that Congress implicitly has endorsed judicially mandated deadlines by failing to repudiate those judicial decisions that have imposed them. See *post*, at 125-126. There is simply no basis for the dissent's proposition that this passage "when read in context, supports only the inference that Congress chose not to 'assert its power to give the district

Finally, the Secretary points out that judicially imposed deadlines may vary from case to case and from State to State, requiring HHS to shuffle its staff nationwide. Not only would this tend seriously to disrupt agency administration, but wide variations in judicially imposed deadlines also would prevent realization of Congress' oft-repeated goal of uniform administration of the Act. See, *e. g.*, S. Rep. No. 96-408, pp. 52-56 (1979) (emphasizing concern over "state-to-state" variations and expressing hope that current legislation would "both improve the quality of determinations and ensure that claimants throughout the Nation will be judged under the same uniform standards *and procedures*") (emphasis added).[27]

B

Legislation enacted by Congress in 1980 and 1982 is fully consistent with the repeated rejection of proposals for mandatory deadlines and with efforts by Congress to ensure qual-

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courts more specific direction.'" *Post*, at 127, n. 8 (quoting *White* v. *Mathews*, 559 F. 2d 852, 861 (CA2 1977), cert. denied, 435 U. S. 908 (1978)).

A 1981 Committee Staff Report recommended that quality should no longer be sacrificed for promptness:

"Back in 1975, [the SSA] gave lip service to quality, worrying primarily about processing time and case backlog. . . .

. . . . .

"Beginning in 1978, the Subcommittee examined in some depth two State agencies—New York and New Jersey—which were expediting cases at the expense of quality with the tacit consent of SSA's Regional Office in New York. Their operations have still not fully recovered. . . . One of the recommendations made by the Social Security Administration . . . was that the State adjudicators 'should be reminded that (1) the goal of adjudication quality takes precedence over that of expeditious processing and (2) that adjudicators should use whatever time is necessary to secure essential medical evidence.'" Staff of the Subcommittee on Social Security of the House Committee on Ways and Means, Status of the Disability Insurance Program, 97th Cong., 1st Sess., 12-13 (Comm. Print 1981).

[27] The dissent's suggestion that Congress meant to prohibit only *nationwide* and not *statewide* deadlines is unpersuasive. The legislative history suggests no distinction between the two. Moreover, injunctive orders imposing varying deadlines from State to State would defeat the express congressional goal of uniformity. See S. Rep. No. 96-408, pp. 52-56 (1979).

ity and uniformity in agency adjudication. In 1980, Congress amended § 405(b) to require that every initial determination of ineligibility contain an easily understandable discussion of the evidence and the reasons for the determination. Pub. L. 96–265, 94 Stat. 457, 42 U. S. C. § 405(b). At the same time, Congress added § 421(i) to require a tri-annual assessment of the continuing eligibility of recipients of disability benefits. Pub. L. 96–265, 94 Stat. 460, 42 U. S. C. § 421(i). Congress also included in the 1980 amendments a requirement that the Secretary review at least 65% of all determinations of eligibility made by state agencies in any fiscal year after 1982. Pub. L. 96–265, 94 Stat. 456, 42 U. S. C. §§ 421(c)(2), (3).[28] Before 1972, the Secretary had reviewed the majority of state determinations as a matter of course. A growing workload required the Secretary to abandon this practice for a sample review of only 5% of the state agency determinations. H. R. Rep. No. 96–100, p. 10 (1979). The 1980 amendment, requiring review of a substantially higher percentage of state agency disability determinations, presumably will have an effect on the timely resolution of disputed disability claims.[29]

Finally, in 1983 Congress provided that effective January 1, 1984, an initial determination that previously granted disability benefits should be terminated entitles the claimant not only to a *de novo* review on reconsideration, but to a full evidentiary hearing as well. Pub. L. 97–455, 96 Stat. 2499, 42 U. S. C. § 405(b)(2). All of these changes will impose additional duties on the Secretary and her heavily burdened staff. In light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have contemplated that courts should have authority to impose the very deadlines it repeatedly has rejected.[30]

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[28] The 1980 amendments also authorized the Secretary to review determinations of ineligibility on her own motion. 42 U. S. C. § 421(c)(1).

[29] The legislative history of this amendment suggests that Congress was concerned that undue emphasis on expediting resolution of disputed claims had resulted in a marked loss of quality and uniformity in agency decisions. See, *e. g.*, S. Rep. No. 96–408, pp. 52–56 (1979).

C

Persuasive evidence of the intention of Congress also is found in the distinction it has made between the resolution of SSI claims for old-age and survivor benefits and SSI claims for disability benefits. Section 405(b), governing eligibility determinations under Title II, and § 1383(c)(1), governing eligibility determinations under Title XVI, are virtually identical. In the event of adverse determinations, both require the Secretary to provide claimants with "reasonable notice and opportunity for a hearing." In the case of disputed SSI claims, however, § 1383(c)(2) requires a posthearing decision within 90 days of the hearing request, except in the case of disputed disability claims. This provision makes two things clear: (i) Congress will establish hearing deadlines when it deems them appropriate; and (ii) Congress has determined that it is inappropriate to subject disputed disability claims to mandatory deadlines.[31]

III

The Secretary also contends that quite apart from the congressional rejection of the mandatory deadlines discussed above, the District Court's order unduly intruded upon the discretion with which Congress has granted the Secretary to adopt rules and procedures for the adjudication of claims. See *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983); *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44 (1981); *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977). We need not reach this broader contention, however, because of repeated congressional rejection of the imposition of mandatory deadlines on agency adjudication of disputed disability claims.[32] In light of the unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims.[33] Accordingly, we vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.[34]

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[30] The suggestion made by the dissent that this legislative history "has little relevance to the task before us," *post*, at 125, is mistaken. The legislative history set forth in this opinion demonstrates far more than simple congressional inaction in the face of acknowledged delays; it explicitly shows that Congress has rejected repeated demands for mandatory deadlines. We rarely see as clear an expression of congressional intent.

[31] As early as 1967, Congress recognized the difference between old-age and disability claims:

"The process of making disability determinations is significantly different from the retirement and survivors insurance claims process. In the disability process[,] State vocational rehabilitation agencies are involved importantly in the making of the decision[,] and in borderline cases[,] lengthy and extensive development of facts of a medical nature is often required." S. Rep. No. 744, 90th Cong., 1st Sess., 107 (1967).

It is so ordered.

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[32] In view of Congress' unequivocal determination that mandatory deadlines are inappropriate, the repeated references in the dissenting opinion to the "reasonableness" of the injunctive order at issue here are simply irrelevant. See *post*, at 121–122, n. 1, 132–133, 134–135. The dissent states that the injunction at issue is "carefully tailored," and assumes that the Secretary would have no difficulty complying with it. *Post*, at 120. Even if this assumption were correct, it hardly suggests that this Court should disregard the considered determination of Congress that mandatory deadlines are inappropriate.

[33] We make clear that nothing in this opinion precludes the proper use of injunctive relief to remedy *individual* violations of § 405(b). Our decision in this case is limited to the question whether, in view of the unequivocally clear intent of Congress to the contrary, it is nevertheless appropriate for a federal court to prescribe mandatory deadlines with respect to the adjudication of disability claims under Title II of the Act. We understand that the courts below were moved by long delays that well may have caused serious deprivations. But this does not justify imposing absolute periods of limitations applicable to all claims—limitations that Congress repeatedly has declined to enact.

[34] The District Court's order requiring the payment of interim benefits was conditioned on noncompliance with the injunction. Because we have held that the injunction is invalid, we need not address the propriety of that part of the District Court's order requiring payment of interim benefits.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

This case determines an issue of vital importance to the Social Security Administration, to disabled Vermont residents, and to federal courts. By failing to ground its opinion in the factual record of the case at hand, the majority has discarded a balanced remedy crafted to effectuate a federal statute. Far from intruding clumsily into a pervasively regulated area, *ante*, at 119, the District Court fashioned a meaningful, carefully tailored statewide remedy that mandated feasible, expeditious reconsideration determinations and hearings, that did not cause extra cost to the Secretary or reallocation to Vermont of resources from other States, and that did not harm other statutory goals such as quality and accuracy of decisionmaking. Because that remedy is not expressly or impliedly prohibited by the Constitution or by statute, and is not an abuse of discretion, I would affirm the judgment of the Court of Appeals.

I

A

As the majority opinion makes clear, the District Court's declaratory judgment that the plaintiff class is entitled to relief is not at issue. The Secretary concedes that 42 U. S. C. § 405(b) compels her to provide claimants a hearing on disputed disability determinations within a reasonable time. Cf., *e. g.*, *White* v. *Mathews*, 559 F. 2d 852, 858 (CA2 1977), cert. denied, 435 U. S. 908 (1978). The Secretary does not contest the District Court's conclusion that, because under the Secretary's regulations a hearing must be preceded by a reconsideration determination, see *ante*, at 106–107, such reconsiderations must also be completed within a reasonable time. The undisputed factual record, submitted primarily by the Secretary herself, supports the District Court's declaratory judgment that the Secretary had failed to fulfill her statutory duty to provide the class representatives and a large portion of the plaintiff class reconsideration determinations and hearings within reasonable periods of time. While the Secretary challenges classwide relief, she has not challenged the District Court's certification of the plaintiff class. Our review, therefore, is limited to the equitable remedy crafted by the District Court and affirmed by the Court of Appeals.

B

A fair assessment of the validity of the District Court's order requires a clear view of its content and the record on which it was based. In brief, the District Court ordered that a member of the plaintiff class—Vermont disability claimants whose benefits have been terminated and new applicants for disability entitlements—who requests review of an initial determination by the Secretary that he or she is not disabled must receive the Secretary's reconsideration within 90 days of his or her request for review. If the reconsideration is adverse and the claimant requests a hearing, the hearing must be held within 90 days of the request. However, both of these time limits are subject to exceptions which have tolling effect. If the Secretary does not provide a hearing within the time limits, she is required to provide interim benefits, which she may recoup if the claimant is ultimately found not to be entitled to benefits.[1]

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[1] The occurrence of one of three events triggers the requirement that interim benefits be paid: the Secretary does not issue a reconsideration decision within 180 days of request; the Secretary fails to hold a hearing within 180 days (plus any delay attributable to the claimant) of a prior request for reconsideration followed by a request for a hearing; the Secretary fails to hold a hearing within 90 days of a request. App. to Pet. for Cert. 34a–35a. The Secretary retains the option under the District Court's conditional order either to conduct review within the established time periods, or to initiate recoupable payments. The agency thus is not operating under the threat of contempt actions for failure to comply with the time limits, and the remedy is consequently minimally intrusive.

Nor has the District Court intruded into the day-to-day operations of the agency. The District Court requested and accepted a plan drafted by the Secretary to implement the order. See App. 196–200. Vermont Title II

The District Court was careful to ensure that its order had no repercussions outside the State of Vermont. The certified class was limited to Vermont Title II claimants. The Secretary stated that the resources allocated by Congress to process hearing requests in that State were the resources she needed to do the job.[2] There was no evidence before the court that enforcing Vermont claimants' statutory right to timely hearings would require the Secretary to reallocate her resources to the detriment of disability claimants in other States.[3]

The District Court ordered compliance with the prescribed time limits only after reviewing extensive responses to interrogatories, in which the Secretary acknowledged not only that she was able to comply with those limits, but that it was her stated policy to do so.[4] The record also supported the court's decision to craft nine exceptions to those time limits. The Secretary argued that the review process required some flexibility, and specified a variety of circumstances in which delay in completing a reconsideration or scheduling a hearing was justified. The District Court tailored its remedy to accommodate each of the Secretary's submissions. If a claimant offers new medical evidence, reports new medical treat-

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claimants' requests for reviews of adverse initial determinations of disability are flagged with a cover sheet that notes the dates by which reconsiderations and hearings should be held, and permits easy recordkeeping of any applicable exceptions that toll the time limits.

[2] Defendant's Answer to Interrogatories Nos. 16, 17, App. 49 (averring that three Administrative Law Judges are needed to conduct Title II disability hearings in Vermont and three have been assigned to the State).

[3] The Secretary agrees that she has been able to fulfill her obligation to provide timely hearings as defined by the District Court. Since the District Court's first injunction went into effect, the Secretary has been able to comply with the hearing timetable in all but one case, and she has done so without transferring any personnel or other resources into Vermont. Tr. of Oral Arg. 33, 51.

[4] Defendant's Answer to Interrogatories, Nos. 19, 24, App. 50, 52 (agency's established policy is to conduct hearings within 90 days of request).

ment since the initial determination, agrees to undergo a consultative examination when the Secretary so suggests, causes a delay by failing to provide the information needed to reconsider the initial determination of nondisability, or otherwise causes a delay, the District Court ordered that the 90-day limit on the time from a reconsideration request to issuance of the notice of the result be tolled. App. to Pet. for Cert. 33a. Because the Secretary urged that it was frequently in the claimant's interest to delay, the court also tolled the time limit for any period of delay requested by the claimant or his representative. *Ibid.* Similarly, the District Court tolled the 90-day limit on the time from a request for a hearing to the provision of a hearing when the claimant or his representative either fails to provide information needed by the Administrative Law Judge (ALJ) for adjudication, requests a delay, fails to appear for the scheduled hearing, or otherwise causes delay. *Id.*, at 34a.

Finally, the remedy pertains only to the Secretary's statutory obligation to provide *hearings* within a reasonable time. The order places no time limit on the Secretary's issuance of decisions, although the plaintiffs, relying on the Social Security Act, the Administrative Procedure Act, 5 U. S. C. §§555(b),(e), 706(1), and the Constitution, included in their request for relief a plea that "a hearing decision be rendered promptly" after a hearing. App. 24. By its repeated references to decisions and overall processing time, the majority implies that the District Court tied the hands of ALJs, forcing them to evaluate complex disability claims in a race against the clock. The order we are reviewing simply does not speak to decisionmaking; it interprets and enforces only a claimant's right to a timely *hearing*.

In sum, the District Court's order was based on an extensive record of the actual operation of the disability program by the State of Vermont and the Secretary, and the plaintiff class members' experience in attempting to assert their statutory right to timely hearings. The order mirrored the Secretary's stated policy of holding hearings within 90 days of a request, a policy she was capable of implementing without additional resources. The District Court created nine exceptions to the mandatory time limits, exceptions directly linked to the Secretary's responsibility to make accurate determinations of disability. And the order placed no time limit on the rendering of decisions. With this clearer understanding of the relief granted by the District Court, we turn to the question whether such an equitable remedy is precluded by law.

II

A

In the absence of a clear command to the contrary from Congress, federal courts have equitable power to issue injunctions in cases over which they have jurisdiction. *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946). This Court has expressly rejected the arguments that the judicial review provision of the Social Security Act "does not encompass the equitable power to direct that the statute be implemented through procedures other than those authorized by the Secretary," and that class injunctive relief is not available under 42 U. S. C. § 405(g). *Califano* v. *Yamasaki*, 442 U. S. 682, 705, and n. 17 (1979). Although Congress has delegated to the Secretary "full power and authority to make rules and regulations and to establish procedures," 42 U. S. C. § 405(a), that discretion is limited by the requirement that procedures be consistent with the Social Security Act, and necessary or appropriate to carry out its provisions. *Ibid.* Courts may require the Secretary to comply with the statute. A federal court thus is not precluded by statute from ordering injunctive relief when the record in a case supports the conclusions that the plaintiffs are entitled to relief and that the likelihood of irreparable harm renders an available remedy at law inadequate.

B

The dominant rationale of the Court's opinion is that an inconclusive debate in Congress during the past decade regarding the wisdom of establishing *nationwide* time limits on the Secretary's review of disability applications clearly evinces the Legislature's hostility to the statewide remedy ordered by the District Court. The postenactment legislative history emphasized by the Secretary and the majority has little relevance to the task before us. If any legislative history were helpful, it would be the history of the statutory provision that first accorded claimants a right to review of adverse determinations and a "reasonable . . . opportunity for a hearing." Act of Aug. 10, 1939, ch. 666, §201, 53 Stat. 1368.[5] That provision has remained intact for 45 years.

Although Congress has amended §205(b) in various respects on seven occasions, it has repeatedly reenacted the "right to a hearing" provision without change or limitation,[6] and has done so over the past decade with a full awareness that courts were enjoining unreasonable delays as contrary to the statutory purpose and violative of the rights conferred on disabled persons by the Social Security Act. This affirmative action deserves acknowledgment and weight. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982); *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–698 (1979); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). The postenactment legislative history simply does not support the conclusion reached by the majority because Congress' failure itself to remedy the delay problem cannot be read to exclude judicial responses. Congress has long been aware of efforts by several federal courts to compel the Secretary to accelerate her review of adverse disability determinations,[7] and has not taken any action to curtail such judicial innovation.[8]

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[5] The legislative history of §205(b) is sparse, but generally supports respondents' position. The bill embodying the "right to a hearing" provision was intended "to strengthen and extend the principles and objectives of the Social Security Act." H. R. Rep. No. 728, 76th Cong., 1st Sess., 5 (1939). The agency charged with implementation of the Act believed the timely provision of hearings to be "the essence of the task to be performed." Federal Security Agency, Social Security Board, Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Claims (1940), reprinted in Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 3, p. 37 (1941). The Social Security Board stated that all hearings should be held within 30 days of request. *Id.*, at 45.

[6] Act of Aug. 28, 1950, ch. 809, §108(a), 64 Stat. 518; Act of Aug. 1, 1956, Pub. L. 880, §111, 70 Stat. 831; Act of July 30, 1965, Pub. L. 89-97, §308(d)(9), 79 Stat. 379; Act of Jan. 2, 1976, Pub. L. 94-202, §4, 89 Stat. 1136; Act of June 9, 1980, Pub. L. 96-265, §305(a), 94 Stat. 457; Act of Jan. 12, 1983, Pub. L. 97-455, §4, 96 Stat. 2499; Social Security Amendments of 1983, Pub. L. 98-21, §§301(d)(1), 309(i)(1), 97 Stat. 111, 117.

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[7] See, *e. g.*, H. R. Conf. Rep. No. 96–944, p. 59 (1980) (Conference Report accompanying Social Security Disability Amendments of 1980, noting without criticism that in the absence of a statutory time limit on adjudication of claims, several District Courts had imposed such limits at the hearing level).

Cases in which federal courts presented with unreasonable delays by the Secretary have imposed deadlines include *Sharpe* v. *Harris*, 621 F. 2d 530 (CA2 1980) (affirming time limits in Supplemental Security Income (SSI) hearings, decisions, and payments to New York State class); *Blankenship* v. *Secretary of HEW*, 587 F. 2d 329 (CA6 1978), on remand, 532 F.Supp. 739 (WD Ky. 1982), aff'd in part, stayed in part, 722 F. 2d 1282 (1983) *(per curiam)* (Title II and SSI claimants' hearings must be held within 180 days; those whose benefits have been terminated have right to decision from Appeals Council within 90 days; order of interim payments after 180-day delay stayed pending decision in the present case), stayed, 465 U. S. 1301 (1984); *Caswell* v. *Califano*, 583 F. 2d 9 (CA1 1978) (90-day limit from request to hearing for Maine Title II claimants); *Barnett* v. *Califano*, 580 F. 2d 28 (CA2 1978) (order applicable to Vermont SSI disability claimants, requiring hearings in most cases within 90 days of request); *White* v. *Mathews*, 559 F. 2d 852 (CA2 1977) (Connecticut disability claimants entitled to hearing and final decision within 120 days; 1-year phase-in of time limit; interim payment of benefits ordered), cert. denied, 435 U. S. 908 (1978); *Chagnon* v. *Schweiker*, 560 F. Supp. 71 (Vt. 1982) (Secretary ordered to provide disability and SSI payments to those found eligible within 60 days after determination of eligibility by an ALJ or the Appeals Coun-

[Footnote 8 is on p. 127]

What insight can be gleaned from the recent history supports the proposition that the District Court's *statewide* prospective injunction setting time limits for reconsideration

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cil); *Crosby* v. *Social Security Administration*, 550 F. Supp. 1278 (Mass. 1982) (Title II and SSI disability claimants have right to a decision within 180 days of request for a hearing (plus time attributable to specified reasonable causes for delay) and to award of interim benefits if deadline not met), appeal pending, No. 83-1077 (CA1). But see *Wright* v. *Califano*, 587 F. 2d 345 (CA7 1978) (reversing order to phase in time limits for review of disputed old-age and survivors' benefits claims, finding delays not so unreasonable as to justify court's exercise of equitable power).

[8] The only congressional suggestion of disapproval of court-ordered timely hearings that the majority has cited, *ante*, at 114–115, and n. 25, when read in context, supports only the inference that Congress chose not to "assert its power to give the district courts more specific direction," *White* v. *Mathews*, *supra*, at 861. If the Committee's remarks are at all germane to our discussion, then it is surely relevant that the Committee reported favorably on a proposed amendment to the Social Security Act that would have limited courts' injunctive authority in remedying delay, an amendment that Congress chose *not* to enact. H. R. 6181, § 10, 97th Cong., 2d Sess. (1982). Moreover, in expressing its disapproval of the *Blankenship* decision, see *ante* at 115, and n. 25, the Committee appeared to distinguish that decision, which involved a nationwide remedial order, from six other court orders which "apply only in the areas under the jurisdiction of the court." H. R. Rep. No. 97–588, p. 19 (1982). Finally, the Committee's concern that strict time limits "could result in incorrect determinations because time was not available to obtain needed medical evidence or to reach well-reasoned decisions," *id.*, at 20, is accommodated in the present case by the tolling provisions in the District Court's order and by the absence of any time limits on the rendering of hearing decisions.

In fact, since the District Court's order, Congress can be said to have endorsed the courts' conclusion that claimants should not bear the entire burden of delay by the Secretary. The 97th Congress substantially enhanced the protection of persons, like respondents Day and Maurais, who have been receiving Title II benefits but whom the Secretary determines are no longer disabled within the meaning of the SSA. If they appeal the Secretary's initial determination, they may elect to continue to receive payments during the pendency of the appeal, subject to return of any overpayment. Act of Jan. 12, 1983, Pub. L. 97–455, § 2, 96 Stat. 2498, 42 U. S. C. § 423(g). The Senate Committee Report explained that "some emergency relief is warranted for workers who are having benefits terminated by State agencies and then—in more than half the cases appealed—

determinations and hearings, far from being inconsistent with "repeated congressional rejection of the imposition of mandatory deadlines on agency adjudication of disputed disability claims," *ante*, at 119, effectively accommodates Congress' concern that review of disputed disability determinations be both accurate and expeditious. While it is correct that Congress hitherto has not enacted a nationwide standard in statutory form, that inaction is relevant to the equitable remedy under review only if statutory nationwide time limits are functionally no different from time limits imposed by a court on the operations within one State. Clearly, they are not. A statutory response is inflexible, requires a concomitant commitment by Congress to provide the resources to enable the Secretary to comply with the standard across the Nation, and is difficult to amend in response to changing experience. A court-ordered timetable is a flexible response to a particular factual record. It can be narrowly tailored to accommodate both the Secretary's obligation and the claimants' rights within the framework of resources and practices in a defined jurisdiction. If new factual developments alter the equitable balance, a court can modify relief. See Fed. Rule Civ. Proc. 60(b)(5); *New York Assn. for Retarded Children, Inc.* v. *Carey*, 706 F. 2d 956, 967 (CA2), cert. denied, 464 U. S. 915 (1983).

Congress' discussion and inaction might be relevant if, in rejecting a statutory remedy, Congress also rejected the existence of the problem. If any theme emerges from the postenactment legislative history, however, it is that delay is inconsistent with the Social Security Act, and imposition of

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having their benefits reinstated by an ALJ." S. Rep. No. 97-648, p. 6 (1982). Although passed as an interim measure expiring in June 1984, the 98th Congress has moved to make continuation of benefits permanent. The Social Security Disability Benefits Reform Act of 1984, H. R. 3755, § 223(g), 98th Cong., 2d Sess. (1984), has passed the House and has been read twice in the Senate. See also Brief for the Alliance of Social Security Disability Recipients et al. as *Amici Curiae*.

deadlines would be consistent.[9] Congress repeatedly suggested to the Secretary that she formulate standards and report back to Congress on the feasibility of time limits.[10] The Secretary repeatedly assured Congress that administrative steps would reduce hearing delays to an acceptable level.[11]

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[9] Had the Secretary adopted mandatory time limits pursuant to her rulemaking authority, and was now facing a challenge rather than bringing one, I have no doubt that she would be citing this same legislative history for the proposition that Congress thought time limits consistent with the Social Security Act. Cf. *Heckler* v. *Campbell*, 461 U. S. 458 (1983). In *Campbell*, the Court upheld the Secretary's reliance on medical-vocational guidelines, noting that since amending the Social Security Act to provide for disability benefits in 1954, Congress repeatedly suggested that the Secretary adopt rules defining the criteria for evaluating disability. "While these sources do not establish the original congressional intent, they indicate that later Congresses perceived that regulations such as the guidelines would be consistent with the statute." *Id.*, at 466, n. 10. The same inferences are available to the Court in the present case.

[10] See, *e. g.*, Pub. L. 96–265, § 308, 94 Stat. 458, note following 42 U. S. C. § 401. The Social Security Disability Amendments of 1980 required the Secretary to report to Congress "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act . . . tak[ing] into account both the need for expeditious processing . . . and the need to assure that all such claims will be thoroughly considered and accurately determined."

[11] See, *e. g.*, H. R. Rep. No. 94–679, p. 2 (1975) (relying on agency's estimate that a limited reform bill could reduce hearing backlog by 3,000 cases a month "so that in 18 months cases can be adjudicated within 90 days"); S. Rep. No. 94–550, p. 3 (1975) (same); Delays in Social Security Appeals, Hearings before Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess., 74 (1975) (assurances of SSA Commissioner Cardwell that backlog could be brought under control and hearings scheduled within 90 days of request by June 1977).

The Secretary has given similar assurances in litigating challenges to delays in the review process. See, *e. g.*, *Sharpe* v. *Harris*, 621 F. 2d, at 531; *White* v. *Mathews*, 434 F. Supp. 1252, 1256–1257 (Conn. 1976), aff'd, 559 F. 2d 852 (CA2 1977); *Crosby* v. *Social Security Administration*, *supra*, at 1282. In the present case, the Secretary opposed the plaintiffs' motion for summary judgment on the issue of liability in part on the ground that she was ready to issue regulations setting 90-day hearing deadlines, and the court should therefore abstain. App. to Pet. for Cert. 18a–19a.

In fact, albeit under court pressure, the Secretary published proposed rules in the Federal Register in 1980, setting nationwide time limits on the review process, and in 1981 characterized revised rules as "realistic [time limits], which we plan to achieve, and for which we expect to be held accountable," and as "time limits which can and should be achieved in the operation of the adjudicatory system as it currently exists," without "significantly greater resources" or "decreases in decisional accuracy."[12]

In sum, for several independent reasons, Congress' reluctance to establish nationwide time limits within which the Secretary must resolve disputed disability claims does not support the inference that Congress disapproves the exercise by federal courts of their equitable power to ensure that disability claimants in particular jurisdictions are not deprived of their statutory entitlements. If any aspect of the post-enactment legislative history of § 205(b) of the Social Security

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[12] Subcommittee on Social Security of the House Committee on Ways and Means, Status of the Disability Insurance Program, 97th Cong., 1st Sess., 45–46 (Comm. Print 1981) (hereinafter 1981 Comm. Print) (response of Social Security Commissioner Driver to Rep. Pickle). The proposed rulemaking set a 90-day limit on hearings, subject to exceptions very similar to the nine exceptions in the present case, and required that hearing decisions issue within 30 days after a hearing is held and the record closed. 45 Fed. Reg. 12838–12839 (1980). Reporting to Congress 10 months later, the Secretary recommended 150 days from application for reconsideration to decision, and 165 days from request for a hearing to issuing a decision, because experience had indicated that, nationwide, the agency could provide hearings within 90 days only in about 70% of the cases, and issue decisions within 30 days in about 80% of the cases. U. S. Dept. of Health and Human Services, Report to Congress, Implementation of Section 308, Public Law 96–265 (Oct. 21, 1980), reprinted in 1981 Comm. Print, at 43.

Whether Congress might have acted affirmatively but for the Secretary's assurances is a matter for conjecture, but it is as valid an inference as the majority's inference that Congress' failure to enact nationwide deadlines, or to order the Secretary to do so pursuant to her rulemaking authority, is an affirmative rejection of the proposition that a claimant's § 205(b) right to a timely hearing should be effectuated through promulgation of time limits.

Act bears directly on the problem before us, it is the fact that Congress has repeatedly reenacted the provision with the awareness that the courts had been ordering the Secretary to comply with time limits when necessary to prevent unreasonable delays in providing reconsiderations and hearings. There is thus no basis for the majority's conclusion that the equitable remedy ordered by the District Court in this case is barred by implication.

III

Because the District Court's remedy is barred neither by an explicit statutory restriction, nor by implication, it should be upheld unless it constitutes an abuse of discretion. The abuse-of-discretion standard is not toothless in this context. We have cautioned the lower federal courts against "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 525 (1978). Congress has mandated hearings on disputed disability determinations, but has committed implementation of the review and hearing process to the Secretary. I agree that the Secretary has substantial discretion, with which the courts should not interfere, in determining how to comply with her statutory obligations.

These general principles of judicial deference to agency discretion in devising procedures to achieve legislatively defined objectives are reinforced by some pragmatic considerations. Excepting, of course, those cases where denial of benefits rises to the level of violations of due process, I would agree that the problem of delay may at times not be susceptible to judicial solution. For example, when crowded administrative dockets are directly linked to limited congressional appropriations and lack of personnel, the only solution may lie in the hands of Congress. Similarly, when delays are directly linked to the fairness and accuracy of the adjudicatory process—for example, when delays result from the need to gather additional medical evidence relevant to the core issue of disability—only the agency charged with determining disability within the terms of the statute may be able to alleviate the problem.

On the other hand, the Secretary's discretion cannot be boundless, and courts must determine whether her actions are sufficient to effectuate the individual entitlements created by Congress. Therefore, many situations quite appropriately call for judicial intervention. For example, when a standard for processing similar cases can be established from the agency's own records, lengthy delays beyond that norm may indicate a dilatory agency response inconsistent with the statutory directive to provide a claimant a timely hearing. Similarly, if the agency's records disclose specific inefficiencies or inactivity that bear no definable relationship to resource constraints or the need to ensure accurate decisionmaking, courts would be remiss in deferring to the agency's unreasonably dilatory processing of claimants' requests for review.

The record in the present case supports the conclusion that the District Court tailored its remedy to respond to causes of delay that are properly susceptible to judicial scrutiny and solution. The District Court considered record evidence of the agency's standard for processing disability hearing requests. The Secretary offered the 90-day figure as her established policy for scheduling hearings. Prior to the District Court's order, she provided hearings within that time in only 57% of the cases, with a 2- to 9-month range of delay. App. to Pet. for Cert. 15a. Yet the Secretary did not complain that she was prevented from complying with her own policy because of lack of resources. To the contrary, she stated that she had the proper complement of ALJs needed to conduct Title II disability hearings in Vermont.[13] Therefore, when the District Court ordered relief, no record evidence suggested that the Secretary would have difficulty complying.

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[13] The Secretary hypothesized four categories of reasons for not scheduling hearings within 90 days: lack of claimant cooperation in providing necessary information; delay in response from medical sources cited by the

When the District Court turned its attention to delays in the reconsideration process, it based its order on 77 representative case summaries provided by the Secretary. Again, the Secretary's own standard was disposition in less than 90 days. The court accepted her description of the "complex and time-consuming" reconsideration process, which encompasses a *de novo* review of the existing record and any necessary supplemental evidence. The court therefore allowed a "reasonable time for locating the claim folder, forwarding it to the appropriate agency, obtaining and assessing additional evidence, and generating notices." *Id.*, at 29a. In each of the 27 cases in which reconsideration took longer than 90 days, however, the court found "periods of unexplained delay, not directly attributable to necessary steps in the reconsideration process." *Id.*, at 28a. It further found that, "when the *explained* delays in the case summaries are subtracted, most, if not all, of the cases could have been completed within 90 days." *Ibid.* (emphasis in original).

Thus, far from imposing an arbitrary deadline on an embattled agency, the court looked first to the standard adopted by the agency itself for meeting its statutory obligation to provide timely hearings within the constraints of the resources available to it. Further, the court explicitly rejected the respondents' contentions that delays beyond a specific number of days violated the statute, and that the mere passage of time justified the extraordinary relief sought by the plaintiff

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claimant; logistical and scheduling problems due to distant travel; and agency assistance to claimants in obtaining complex and specialized medical development. Answers to Interrogatories Nos. 23, 24, App. 52. The Secretary provided no evidence that any of these reasons caused delays in scheduling the class representatives' hearings.

class. App. 99–100. Rather, the court framed the question as the *reasonableness* of the delays.[14] The court's demands to the parties over a 3-year period to produce a record sufficient to answer the question presented[15] evinces its reluctance to substitute its own sense of proper agency procedure for that of the Secretary.

The court's remedy similarly reflects its sensitivity to the special difficulties of administering the massive Social Security system, and to the challenges the Secretary faces in meeting the administrative goals of accuracy and promptness. Cf. *Califano* v. *Boles*, 443 U. S. 282, 285 (1979). By exempting from its order circumstances in which the agency needed to gather medical evidence and reports, the court responded to the Secretary's concern that she not be forced to sacrifice accuracy for the sake of providing more expeditious hearings. By exempting circumstances in which the claimant failed to cooperate in the process or contributed to the delay, the court accommodated the Secretary's concern that she be permitted the degree of flexibility required in the best interests of the claimants as well as the agency. And, of course, a significant accommodation to the Secretary's concern for accurate determinations in the court's order is its total exemption of the decisionmaking, as opposed to the information-gathering, process. There is no time limit whatsoever placed on ALJs' deliberations and issuance of decisions. ALJs have sufficient time to deliberate to ensure accurate decisions, and to schedule new consultative examinations if additional evidence is required.

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[14] Midway through the litigation, the court found the record "devoid of information concerning the reasons why the delays occurred. The plaintiffs have recognized that there will be times when the delay is either requested by the recipients to enable them to provide additional information or is caused by the recipients' failure to cooperate with the Secretary's requests. Similarly, the Secretary has acknowledged that delays may have been the result of increased case-load or insufficient staffing. It is clear, then, that the record is inconclusive with respect to the reasonableness of the delays. And since the reasonableness of the delays is the prime question before the court, the motions for summary judgment must be denied." Memorandum Decision of July 14, 1980, App. 99–100. Only after continued discovery did the court rule that delays beyond 90 days were unreasonable. App. to Pet. for Cert. 28a–29a.

[15] In response to plaintiffs' third request for interrogatories, seeking the data demanded by Judge Holden, the Secretary chose to submit 77 randomly selected disability reconsideration cases selected by her from a total of 453 reconsiderations performed between October 1, 1977, and January 31, 1980. Defendant's Answers to Third Interrogatories, Mar. 30, 1981, App. 105–149, 193–195.

Finally, the consequences of the injunction are a further indication of the reasonableness of the court's interpretation of the statutory mandate. Cf. *Califano* v. *Yamasaki*, 442 U. S., at 697. During the 28 months in which a hearing injunction has been in effect, the Secretary has met the standard in all but one case, without additional allocation of resources and subsequent adverse impact elsewhere in the Social Security Title II disability claims system. Brief for Respondents 30, n. 32; Tr. of Oral Arg. 33, 51. This record suggests both that the injunction has not had the slightest impact on the Secretary's nationwide management of the disability review process, and that the injunction has had the desired effect of enforcing disabled Vermonters' rights to timely hearings.

A remedy manifestly attentive to the Secretary's practical and policy concerns should not be held to be an abuse of discretion. The District Court's order applied only to delay that was found as fact *not* to be the "direct and foreseeable consequenc[e] . . . of the conscientious implementation of the Social Security Act." Brief for Petitioner 33. Given the additional record evidence that 21.3% of the initial determinations that a claimant was not disabled within the meaning of the Social Security Act were found on reconsideration to be erroneous, and 56.2% of the decisions were reversed at the hearing stage, App. 53, the court properly responded to the special urgency of enjoining unreasonable barriers to claimants' receipt of benefits mandated by Congress.[16]

IV

In summary, the relief ordered in this case was founded on three correct premises. First, a federal court has a responsibility to enforce the right to a hearing expressly granted in the Social Security Act. The Act requires that such a hearing be timely. Second, the mere length of processing times does not constitute an adequate basis for classwide injunctive relief, for the delay may be attributable to reasons related to the Secretary's mandate to make accurate as well as expeditious disability determinations within the constraints of the resources at her disposal. However, if the causes of delay are unrelated to the adjudicative process, the delay is unreasonable. Third, the unreasonableness of delay is of magnified significance when the record establishes that more than half of the Vermont claimants who pursue their right to an administrative hearing are found to have been disabled and to be entitled to the payments initially denied by the Secretary. By definition, a disabled person has been unable "to engage in *any* substantial gainful activity," 42 U. S. C. § 423(d)(1)(A) (emphasis supplied), and deprivation of income works hardships that cannot adequately be compensated by retroactive payments following a delayed decision in his or her favor. Therefore, in the face of irreparable harm to the plaintiff class, which has established a statutory right to relief, a federal court properly may order injunctive relief, and properly did so in the present case.

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[16] The significance we place on the reversal rate must be tempered by the fact that the administrative appeals process permits introduction of additional evidence of disability at each stage. Therefore, a denial of disability status at one stage could well have been "correct" based on the evidence available to the decisionmaker. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 346–347 (1976). Nonetheless, the fact remains that hundreds of disabled Vermonters endure grave hardship because they do not receive entitlements during the delayed review process. The Government has an obligation to the rightful beneficiaries of its insurance program. Members of the plaintiff class were once workers, paying into the Social Security system for the required number of years to earn entitlement to income when disabling illness or accident keeps them from the workplace.

I dissent.

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 82–629. Argued November 29, 1983—Decided May 29, 1984

The North Dakota statute (Chapter 27–19) governing the Indian civil jurisdiction of the state courts provides that jurisdiction shall extend "over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens." North Dakota's Enabling Act provides that all Indian land "shall remain under the absolute jurisdiction and control of Congress." Petitioner Indian Tribe, which had not accepted state civil jurisdiction under Chapter 27–19, employed respondent Wold Engineering (hereafter respondent) to design and build a water-supply system on petitioner's reservation in North Dakota. When the project was completed, it did not perform to petitioner's satisfaction, and petitioner sued respondent in a North Dakota state court for negligence and breach of contract. At the time suit was filed, petitioner's tribal court did not have jurisdiction over a claim by an Indian against a non-Indian in the absence of an agreement by the parties. Although the subject matter of petitioner's complaint was within the general scope of the state court's jurisdiction, that court granted respondent's motion to dismiss the complaint on the ground that the court lacked subject-matter jurisdiction over any claim arising in Indian country, including a claim by an Indian against a non-Indian. The North Dakota Supreme Court affirmed. Interpreting Chapter 27–19 to disclaim state-court jurisdiction over a claim against a non-Indian by an Indian tribe that had not accepted jurisdiction under the statute, the court determined that the North Dakota Legislature had disclaimed jurisdiction pursuant to the federal statute (Pub. L. 280) governing state jurisdiction over Indian country and that such disclaimer, because it had been authorized by Pub. L. 280, did not violate either the North Dakota or Federal Constitution. The court rejected petitioner's argument that the jurisdiction that it had recognized in *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432—wherein it was held that the existing jurisdictional disclaimers in the State's Enabling Act and Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves—had not been extinguished altogether and that the North Dakota courts possessed "residuary jurisdiction" over a claim by an Indian against a non-Indian following the enactment of Pub. L. 280 and the Civil Rights Act of 1968, which amended

Pub. L. 280 to require that all subsequent assertions of jurisdiction be preceded by tribal consent. The court also rejected petitioner's argument that to prohibit a suit such as petitioner's would violate the Equal Protection Clause of the Fourteenth Amendment and deny petitioner equal access to the courts in violation of the North Dakota Constitution.

Held:

1. No federal law or policy required the North Dakota courts to forgo in this case the jurisdiction recognized in *Vermillion, supra.* Pp. 147–151.

(a) The exercise of state-court jurisdiction in this case would not interfere with the right of tribal Indians to govern themselves under their own laws. As a general matter, tribal self-government is not impeded when a State allows an Indian to seek relief against a non-Indian concerning a claim arising in Indian country. The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted. Pp. 147–149.

(b) Nor would the exercise of state jurisdiction here be inconsistent with the federal and tribal interests reflected in North Dakota's Enabling Act or in Pub. L. 280. The legislative record suggests only that the Enabling Act's phrase "absolute [congressional] jurisdiction and control" was meant to foreclose state regulation and taxation of Indians and their lands, not that Indians were to be prohibited from entering state courts to pursue judicial remedies against non-Indians. Public Law 280 does not either require North Dakota to disclaim the basic jurisdiction recognized in *Vermillion* or authorize it to do so. Nothing in Pub. L. 280's language or legislative history indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction. Pp. 149–151.

2. Where it is uncertain whether the North Dakota Supreme Court's interpretation of Chapter 27–19 rested on a misconception of federal law, its judgment will be vacated, and the case will be remanded to that court for reconsideration of the state-law question. Pp. 151–158.

(a) The court's incorrect assumption that Pub. L. 280 and the Civil Rights Act of 1968 either authorized North Dakota to disclaim jurisdiction or affirmatively forbade the exercise of jurisdiction absent tribal consent appears to have been the sole basis relied upon by the court to avoid holding the jurisdictional disclaimer unconstitutional as applied in this case. Pp. 154–155.

(b) The manner in which the court rejected the availability of "residuary jurisdiction" leaves open the possibility that, despite the court's references to state law, it regarded federal law as an affirmative bar to the exercise of jurisdiction here and interpreted state law to avoid a perceived conflict. Pp. 155–157.

(c) The conclusion that the North Dakota Supreme Court's state-law decision may have rested on federal law is buttressed by prudential considerations. If that court is not given an opportunity to reconsider its conclusions with the proper understanding of federal law, this Court, contrary to the fundamental rule that it will not reach constitutional questions in advance of the necessity of deciding them, will be required to decide whether North Dakota has denied petitioner equal protection under the Fourteenth Amendment. Pp. 157–158.

321 N. W. 2d 510, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 159.

Raymond Cross argued the cause for petitioner. With him on the briefs was *John O. Holm.*

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Habicht*, and *Edwin S. Kneedler.*

Hugh McCutcheon argued the cause for respondents and filed a brief for respondent Wold Engineering, P. C.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This litigation presents issues of state-court civil jurisdiction over a claim asserted by an Indian tribe. The case, as it comes to us, is somewhat unusual in a central respect: the Tribe seeks, rather than contests, state-court jurisdiction, and the non-Indian party is in opposition. Cf. *Williams* v. *Lee*, 358 U. S. 217 (1959).

Chapter 27–19 of the North Dakota Century Code (1974) is entitled "Indian Civil Jurisdiction." Section 27–19–01 of that

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*Briefs of *amici curiae* urging reversal were filed for the Standing Rock Sioux Tribe et al. by *Reid Peyton Chambers;* and for the Turtle Mountain Band of Chippewa Indians by *Kim Jerome Gottschalk* and *Richard B. Collins.*

Code provides that the jurisdiction of North Dakota courts shall extend "over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens." In this case, the Supreme Court of North Dakota interpreted Chapter 27–19 to disclaim state-court jurisdiction over a claim (against a non-Indian) by an Indian Tribe that had not accepted jurisdiction under the statute. The court determined that the North Dakota Legislature had disclaimed jurisdiction pursuant to the principal federal statute governing state jurisdiction over Indian country, namely, the Act of Aug. 15, 1953, 67 Stat. 588, as amended, 28 U. S. C. § 1360, commonly known as Pub. L. 280. The court further concluded that the jurisdictional disclaimer, inasmuch as it was authorized by Pub. L. 280, did not run afoul of the North Dakota or Federal Constitutions. Because the North Dakota Supreme Court's interpretation of Chapter 27–19 and its accompanying constitutional analysis appear to us to rest on a possible misunderstanding of Pub. L. 280, we vacate the court's judgment and remand the case to allow reconsideration of the jurisdictional questions in the light of what we feel is the proper meaning of the federal statute.

I

A. Petitioner Three Affiliated Tribes of the Fort Berthold Reservation is a federally recognized Indian Tribe with its reservation in northwestern North Dakota. Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 1032. See *City of New Town* v. *United States*, 454 F. 2d 121 (CA8 1972). In 1974, petitioner employed respondent Wold Engineering, P. C. (hereafter respondent), a North Dakota corporation, to design and build the Four Bears Water System Project, a water-supply system located wholly within the reservation. The project was completed in 1977 but it did not perform to petitioner's satisfaction.

In 1980, petitioner sued respondent in a North Dakota state court for negligence and breach of contract. At the time the suit was filed, petitioner's tribal court did not have jurisdiction over a claim by an Indian against a non-Indian in the absence of an agreement by the parties. Tribal Code, ch. II, § 1(a).[1] The subject matter of petitioner's complaint, however, clearly fell within the scope of the state trial court's general jurisdiction. See N. D. Const., Art. VI, § 8; N. D. Cent. Code § 27-05-06 (1974 and Supp. 1983). After counterclaiming for petitioner's alleged failure to complete its payments on the water-supply system, respondent moved to dismiss petitioner's complaint on the ground that the trial court lacked subject-matter jurisdiction over any claim arising in Indian country.

B. At this point, in order to place respondent's jurisdictional argument in perspective, it is desirable to review the somewhat erratic course of federal and state law governing North Dakota's jurisdiction over the State's Indian reservations. Long before North Dakota became a State, this Court had recognized the general principle that Indian territories were beyond the legislative and judicial jurisdiction of state governments. *Worcester* v. *Georgia*, 6 Pet. 515 (1832); see generally *Williams* v. *Lee*, 358 U. S., at 218-222. That principle was reflected in the federal statute that granted statehood to North Dakota. Like many other other States in the Midwest and West,[2] North Dakota was required to "disclaim all right and title . . . to all lands lying within [the State] owned or held by any Indian or Indian tribes" as a condition for admission to the Union. Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 677. The Act further provided that all such Indian land shall "remain subject to the disposition of the United States, and . . . shall remain under the absolute jurisdiction and control of the Congress of the United

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[1] Following the North Dakota Supreme Court's decision in this case, petitioner's Tribal Business Council amended the Tribal Code to grant the tribal court subject-matter jurisdiction over all civil causes of action arising within the boundaries of the Fort Berthold Reservation.

[2] See F. Cohen, Handbook of Federal Indian Law 268, and n. 72 (1982 ed.).

States." *Ibid.* North Dakota's original Constitution contained, in identical terms, the required jurisdictional disclaimers. See N. D. Const., Art. XVI, § 203, cl. 2 (1889).

Federal restrictions on North Dakota's jurisdiction over Indian country, however, were substantially eliminated in 1953 with the enactment of the aforementioned Pub. L. 280. See generally *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 471–474 (1979).[3] Sections 2 and 4 of Pub. L. 280 gave five States full jurisdiction, with a stated minor exception as to each of two States, over civil and criminal actions involving Indians and arising in Indian country. 67 Stat. 588–589, codified, as amended, at 18 U. S. C. § 1162 and 28 U. S. C. § 1360, respectively. Sections 6 and 7 gave all other States the option of assuming similar jurisdiction. Section 6 authorized States whose constitutions and statutes contained federally imposed jurisdictional restraints, like North Dakota's, to amend their laws to assume jurisdiction. 67 Stat. 590, codified, as amended, at 25 U. S. C. § 1324. Section 7 provided similar federal consent to any other State not having civil and criminal jurisdiction, but required such States to assume jurisdiction through "affirmative legislative action." 67 Stat. 590. As originally enacted, Pub. L. 280 did not require States to obtain the consent of affected Indian tribes before assuming jurisdiction over them. Title IV of the Civil Rights Act of 1968 amended Pub. L. 280, however, to require that all subsequent assertions of jurisdiction be preceded by tribal consent. Pub. L. 90–284, §§ 401, 402, 406, 82 Stat. 78–80, codified at 25 U. S. C. §§ 1321, 1322, 1326.

Even before North Dakota moved to amend its Constitution and assume full jurisdiction under Pub. L. 280, the North Dakota Supreme Court had taken an *expansive* view of the scope of state-court jurisdiction over Indians in Indian country. In 1957, the court held that the existing jurisdictional disclaimers in the Enabling Act and the State's Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves. *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432. The following year, 1958, North Dakota amended its Constitution to authorize its legislature to "provid[e] for the acceptance of such jurisdiction [over Indian country] as may be delegated to the State by Act of Congress." N. D. Const., Art. XIII, § 1, cl. 2. Finally, in 1963, the North Dakota Legislature enacted Chapter 27–19, the principal section of which provides:

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[3] Before that, however, Congress had vested North Dakota with certain criminal jurisdiction over the Devils Lake Reservation. Act of May 31, 1946, ch. 279, 60 Stat. 229.

> "In accordance with the provisions of Public Law 280 . . . and [the amended] North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state." N. D. Cent. Code § 27–19–01 (1974).

On their face, both the 1958 amendment to the North Dakota Constitution and Chapter 27–19 appear to *expand* preexisting state jurisdiction over Indian country rather than to contract it. In *In re Whiteshield*, 124 N. W. 2d 694 (1963), however, the North Dakota Supreme Court reached the conclusion that Chapter 27–19 actually *disclaimed* all jurisdiction over claims arising in Indian country absent Indian consent. In subsequent decisions, that court adhered to its general view that without Indian consent "the State has no jurisdiction over any civil cause arising on an Indian reservation in this State." *White Eagle* v. *Dorgan*, 209 N. W. 2d 621, 623

(1973).[4] In each case in which the North Dakota Supreme Court declined to recognize jurisdiction, however, the defendant was an Indian; the court never had held squarely that an Indian could not maintain an action against a non-Indian in state court for a claim arising in Indian country.[5]

C. Respondent's motion to dismiss rested on the restrictive jurisdictional principles of *Whiteshield* and its successors. Because the petitioner Tribe at no point has consented to state-court jurisdiction under Chapter 27–19 over the Fort Berthold Reservation, respondent argued that the trial court lacked jurisdiction over petitioner's claim under Chapter 27–19 and the amended provisions of Pub. L. 280. Petitioner opposed respondent's motion to dismiss on the ground, *inter alia,* that the tribal consent requirements of the Civil Rights Act of 1968 were not meant to apply to a suit brought by a tribal government like petitioner. The trial court rejected petitioner's arguments and granted the motion to dismiss the suit for lack of jurisdiction, but did so without prejudice to a renewal of the action following compliance with the state and federal consent requirements. App. to Pet. for Cert. 1a.

On appeal, the North Dakota Supreme Court affirmed. 321 N. W. 2d 510 (1982). Petitioner argued that the jurisdiction recognized in *Vermillion* had not been extinguished altogether and that the North Dakota courts possessed "residuary jurisdiction" over a claim by an Indian against a non-Indian following the enactment of Pub. L. 280 and the Civil Rights Act of 1968. The court rejected this argument, adhering instead to its conclusion in *Nelson* v. *Dubois,* 232

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[4] In *Gourneau* v. *Smith,* 207 N. W. 2d 256, 258 (1973), the court expressly held that *Vermillion* "no longer states the rule to be applied . . . in a case between Indians arising out of use of the public highways on an Indian reservation."

[5] In *United States ex rel. Hall* v. *Hansen,* 303 N. W. 2d 349, 350, and n. 3 (1981), however, the court did state in dictum that a state trial court lacked jurisdiction over a claim by an Indian against a non-Indian arising in Indian country.

N. W. 2d 54 (1975), that any residuary jurisdiction was preempted by the tribal consent requirements contained in the Civil Rights Act of 1968. After reviewing the history of North Dakota's jurisdiction over Indian country, the court reaffirmed its prior holdings, observing that "we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction." 321 N. W. 2d, at 512.

The court also rejected petitioner's argument that to prohibit an Indian plaintiff from suing a non-Indian in state court for a claim arising on an Indian reservation would violate the Equal Protection Clause of the Fourteenth Amendment and deny petitioner equal access to the courts, in violation of the North Dakota Constitution.[6] The court relied on *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979), in which this Court rejected an equal protection challenge to a state jurisdictional statute that relied on tribal classifications. In *Yakima Indian Nation* the Court held that the unique legal status of Indian tribes under federal law permitted the Federal Government to single out tribal Indians in ways that otherwise might be unconstitutional, and that the state jurisdictional statute at issue there was insulated from strict scrutiny under the Equal Protection Clause because it was enacted under the authority of Pub. L. 280. 439 U. S., at 499–502. The North Dakota Supreme Court concluded: "Likewise, the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27–19 . . . was enacted." 321 N. W. 2d, at 513. As a result, any discrimination against Indian litigants did not violate the State or Federal Constitutions. *Ibid.*

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[6] "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay." N. D. Const., Art. I, § 9. The State's Constitution further provides that no citizen or class of citizens "shall . . . be granted privileges or immunities which upon the same terms shall not be granted to all citizens." Art. I, § 21.

Because of the complexity and importance of the issue posed by the North Dakota Supreme Court's decision, we granted certiorari. 461 U. S. 904 (1983).

II

Respondent does not dispute that petitioner's claim comes within the scope of the civil jurisdiction recognized by the North Dakota court in its *Vermillion* ruling in 1957. Respondent advances two arguments in support of the North Dakota Supreme Court's conclusion that state-court jurisdiction no longer extends so far. The first is that federal law precludes the state courts from asserting jurisdiction over petitioner's claim. The second is that, regardless of federal law, the North Dakota Supreme Court has held that the trial court lacked jurisdiction as a matter of state law. We address these arguments in turn.

A

Although this Court has departed from the rigid demarcation of state and tribal authority laid down in 1832 in *Worcester* v. *Georgia*, 6 Pet. 515, the assertion of state authority over tribal reservations remains subject to "two independent but related barriers." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980). First, a particular exercise of state authority may be foreclosed because it would undermine "'the right of reservation Indians to make their own laws and be ruled by them.'" *Ibid.*, quoting *Williams* v. *Lee*, 358 U. S., at 220. Second, state authority may be pre-empted by incompatible federal law. *White Mountain*, 448 U. S., at 142. Accord, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 334, and n. 16 (1983); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U. S. 832, 837–838 (1982); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 179 (1973). We do not believe that either of these barriers precludes North Dakota courts from entertaining a civil action by an Indian tribe against a non-Indian for a claim arising on an Indian reservation.

Despite respondent's arguments, we fail to see how the exercise of state-court jurisdiction in this case would interfere with the right of tribal Indians to govern themselves under their own laws. To be sure, the full breadth of state-court jurisdiction recognized in *Vermillion* cannot be squared with principles of tribal autonomy; to the extent that *Vermillion* permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians or over claims between Indians, it intruded impermissibly on tribal self-governance. See *Fisher* v. *District Court*, 424 U. S. 382 (1976); *Williams* v. *Lee, supra.* This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 173 (dictum); *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365 (1968); *Williams* v. *Lee*, 358 U. S., at 219 (dictum); *United States* v. *Candelaria*, 271 U. S. 432, 444 (1926); *Felix* v. *Patrick*, 145 U. S. 317, 332 (1892); *Fellows* v. *Blacksmith*, 19 How. 366 (1857).[7] The interests implicated in such cases are very different from those present in *Williams* v. *Lee*, where a non-Indian sued an Indian in state court for debts incurred in Indian country, or in *Fisher* v. *District Court*, where this Court held that a tribal court had exclusive jurisdiction over an adoption proceeding in which all parties were tribal Indians residing on a reservation. As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.

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[7] A number of state courts have recognized the right of Indians to bring suits in state courts against non-Indians for claims arising in Indian country. See, *e. g.*, *McCrea* v. *Busch*, 164 Mont. 442, 524 P. 2d 781 (1974); *Paiz* v. *Hughes*, 76 N. M. 562, 417 P. 2d 51 (1966); *Whiting* v. *Hoffine*, 294 N. W. 2d 921, 923–924 (S. D. 1980).

Neither are we persuaded that the exercise of state jurisdiction here would be inconsistent with the federal and tribal interests reflected in North Dakota's Enabling Act or in Pub. L. 280. As for the disclaimer provisions of the Enabling Act, the presence or absence of specific jurisdictional disclaimers rarely has had controlling significance in this Court's past decisions about state jurisdiction over Indian affairs or activities on Indian lands. *Arizona* v. *San Carlos Apache Tribe*, 463 U. S. 545, 562 (1983); see F. Cohen, Handbook of Federal Indian Law 268 (1982 ed.).[8] In this case, the sparse legislative record suggests only that the Enabling Act's phrase "absolute [congressional] jurisdiction and control" was meant to foreclose state regulation and taxation of Indians and their lands, not that Indians were to be prohibited from entering state courts to pursue judicial remedies against non-Indians. See H. R. Rep. No. 1025, 50th Cong., 1st Sess., 8–9, 24 (1888). To the extent that the disclaimer language of the Enabling Act may be regarded as ambiguous, moreover, it is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918). It would be contrary to this principle to resolve any ambiguity in the language of the Enabling Act in favor of a construction under which North Dakota could not provide a judicial forum for an Indian to obtain relief against a non-Indian.

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[8] In *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 71 (1962), this Court held that the phrase "absolute jurisdiction and control" was not intended to oust States completely from all authority concerning Indian lands. See, however, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 176, n. 15 (1973).

We also cannot subscribe to the view that Pub. L. 280 either required North Dakota to disclaim the basic jurisdiction recognized in *Vermillion* or authorized it to do so. This Court previously has recognized that Pub. L. 280 was intended to facilitate rather than to impede the transfer of jurisdictional authority to the States. *Washington* v. *Yakima Indian Nation*, 439 U. S., at 490; see also *Bryan* v. *Itasca County*, 426 U. S., at 383–390. Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction.[9] Section 6 of the federal statute authorized a State whose enabling Act and constitution contained jurisdictional disclaimers "to remove any legal impediment to the *assumption* of civil and criminal jurisdiction" (emphasis added). 67 Stat. 590, codified, as amended, at 25 U. S. C. § 1324. Similarly, § 7 gave congressional consent to the assumption of jurisdiction by any other State "not having jurisdiction." 67 Stat. 590. By their terms, therefore, both § 6 and § 7 were designed to eliminate obstacles to the assumption of jurisdiction rather than to require pre-existing jurisdiction to be disclaimed. Although the Civil Rights Act of 1968 amended Pub. L. 280 by adding tribal consent requirements, those requirements were not made retroactive;[10] the 1968 amendments therefore did not displace jurisdiction previously assumed under Pub. L. 280, much less jurisdiction assumed prior to and apart from Pub. L. 280. Similarly, while Pub. L. 280 authorized States to assume partial rather than full civil jurisdiction, see *Washington* v. *Yakima Indian Nation*, 439 U. S., at 493–499, nothing in Pub. L. 280 purports to authorize States to disclaim pre-existing jurisdiction. Indeed, the Civil Rights Act of 1968 granted States the authority to retrocede jurisdiction acquired under Pub. L. 280 precisely because Pub. L. 280 itself did not authorize such jurisdictional disclaimers.[11]

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[9] Although *Vermillion* was decided after the enactment of Pub. L. 280, the North Dakota Supreme Court made clear that it was confirming pre-existing jurisdiction rather than establishing a previously unavailable jurisdictional category. See *Vermillion* v. *Spotted Elk*, 85 N. W. 2d, at 435–436.

[10] See 25 U. S. C. §§ 1321(a), 1322(a), 1326; S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967) (additional views of Sen. Ervin); Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. Rev. 535, 551 (1975).

In sum, then, no federal law or policy required the North Dakota courts to forgo the jurisdiction recognized in *Vermillion* in this case. If the North Dakota Supreme Court's jurisdictional ruling is to stand, it must be shown to rest on state rather than federal law.

B

This Court concededly has no authority to revise the North Dakota Supreme Court's interpretation of state jurisdictional law. Only last Term, in *Arizona* v. *San Carlos Apache Tribe*, *supra*, we noted that "to the extent that a claimed bar to state jurisdiction . . . is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority." 463 U. S., at 561. That principle is equally applicable, of course, with respect to jurisdictional bars grounded in state statutes. If the North Dakota Supreme Court's decision that the trial court lacked jurisdiction in this case rested solely on state law, the only remaining issue before this Court would be petitioner's argument that the jurisdictional disclaimer here violates petitioner's federal constitutional rights.[12]

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[11] See 25 U. S. C. § 1323(a); 2 U. S. Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, pp. 1951–1952 (1979); see also Goldberg, *supra*, at 558–562. Although any assumption of jurisdiction pursuant to Pub. L. 280 must comply with that statute's procedural requirements, see *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971), Pub. L. 280's requirements simply have no bearing on jurisdiction lawfully assumed prior to its enactment.

It is equally well established, however, that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. See, *e. g.*, *United Air Lines, Inc.* v. *Mahin*, 410 U. S. 623, 630–632 (1973); *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 513–515 (1939); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120 (1924); see also *San Diego Building Trades Council* v. *Garmon*, 353 U. S. 26 (1957). In others, in contrast, the state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority. See, *e. g.*, *Standard Oil Co.* v. *Johnson*, 316 U. S. 481 (1942). In both categories of cases, this Court has reviewed the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.[13]

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[12] The United States and the Turtle Mountain Band of Chippewa Indians, each of whom has filed a brief *amicus curiae* in support of petitioner, suggest that Chapter 27–19 may violate 42 U. S. C. § 1981 to the extent that it precludes petitioner from maintaining its action in state court. Section 1981 provides in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to sue . . . as is enjoyed by white citizens." Petitioner does not appear to have relied on § 1981 before the North Dakota Supreme Court, nor has it done so here. In light of our disposition of this case, we need not decide whether the § 1981 issue is properly before us or, if so, whether a violation of § 1981 has been made out. The Supreme Court of North Dakota is free, of course, to consider the applicability of § 1981 on remand if it deems the issue to be properly before it.

[13] See 28 U. S. C. § 2106. In *United Air Lines, Inc.* v. *Mahin*, for example, two justices of the Illinois Supreme Court had construed a state tax

Here, a careful reading of the North Dakota Supreme Court's opinion leaves us far from certain that the court's present interpretation of Chapter 27–19 does not rest on a misconception of federal law. In determining the role played by that court's understanding of federal law, we are guided by the jurisdictional principles that have come to govern our calculation of adequate and independent state grounds. In *Michigan* v. *Long*, 463 U. S. 1032 (1983), this Court ruled that "when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040–1041. Although petitioner's constitutional challenge to the North Dakota Supreme Court's judgment means that we do not face a question of our own jurisdiction, see *Standard Oil Co.* v. *Johnson*, 316 U. S., at 482–483, we believe that the same general interpretive principles properly apply here. The North Dakota Supreme Court's opinion does state that the North Dakota Legislature "totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation," but it adds that the legislature did so "pursuant to Public Law 280," "[u]nder the authority of Public Law 280," and "under explicit authority granted by Congress in the exercise of its federal power over Indians." 321 N. W. 2d, at 511, 513. There are at least two respects in which these references and other language in the court's opinion leave it far less than clear that the North Dakota

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statute to avoid a perceived conflict with the dormant Commerce Clause. This Court held that the interpretation forgone by the Illinois Supreme Court would not have run afoul of the Commerce Clause, and therefore remanded the case "to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.'" 410 U. S., at 632, quoting *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 443 (1952).

Supreme Court's interpretation of Chapter 27–19 was not influenced by its understanding of federal law.

First, the court's treatment of petitioner's constitutional claims strongly suggests that the court's underlying interpretation of Chapter 27–19 would have been different if the court had realized from the outset that federal law does not insulate the present jurisdictional disclaimer from state and federal constitutional scrutiny. While we express no view about the merits of petitioner's federal equal protection challenge, we note that the North Dakota Supreme Court rejected petitioner's state and federal constitutional claims not because it viewed them as otherwise meritless, but because "the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians" in disclaiming state jurisdiction. 321 N. W. 2d, at 513. The court had proceeded on a similar assumption before; in *Gourneau* v. *Smith*, 207 N. W. 2d 256 (1973), for example, the court rejected an Indian plaintiff's jurisdictional claim based on the "open courts" provision of N. D. Const. Art. I, § 9, because the tribal consent requirements of the Civil Rights Act of 1968 were taken to foreclose jurisdiction:

> "The courts of the State of North Dakota are open to all persons. But . . . Federal law prohibits State courts from assuming jurisdiction of civil actions involving Indians which arise on an Indian reservation, until such time as the Indians of that reservation have consented to such jurisdiction. Thus the courts of the State of North Dakota are open to Indians, if they consent to the courts' jurisdiction as provided by law." 207 N. W. 2d, at 259.

The assumption that Pub. L. 280 and the Civil Rights Act of 1968 either authorized North Dakota to disclaim jurisdiction or affirmatively forbade the exercise of jurisdiction absent tribal consent is incorrect, for the reasons given above. That assumption, however, appears to have been the sole basis relied on by the North Dakota Supreme Court to avoid holding the jurisdictional disclaimer unconstitutional as applied in this case. Because the North Dakota Supreme Court has adhered consistently to the policy of construing state statutes to avoid potential state and federal constitutional problems, see, *e. g., State* v. *Kottenbroch*, 319 N. W. 2d 465, 473 (1982); *Paluck* v. *Board of County Comm'rs*, 307 N. W. 2d 852, 856 (1981); *Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, 294 N. W. 2d 767, 772 (1980); *North American Coal Corp.* v. *Huber*, 268 N. W. 2d 593, 596 (1978); *Tang* v. *Ping*, 209 N. W. 2d 624, 628 (1973), it is entirely possible that the court would have avoided any constitutional question by construing Chapter 27–19 not to disclaim jurisdiction here, and it is equally possible that the court will reconstrue Chapter 27–19 that way if it is given an opportunity to do so.

Second, the manner in which the court rejected the availability of "residuary jurisdiction" leaves open the possibility that, despite the court's references to state law, the court regarded federal law as an affirmative bar to the exercise of jurisdiction here. The court stated:

> "In essence, [petitioner] argues that North Dakota retained residuary jurisdiction over actions brought by Indians against non-Indians for civil wrongs committed on Indian lands. . . . That argument would be more convincing had the legislature of North Dakota not, pursuant to Public Law 280, totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation. *In re Whiteshield*, 124 N. W. 2d 694 (N. D. 1963). In *Nelson* v. *Dubois*, 232 N. W. 2d 54 (N. D. 1975), . . . *we rejected the concept of 'residuary' jurisdiction. We adhere to that decision today.*" 321 N. W. 2d, at 511 (emphasis added).

The court's reliance on *Nelson* v. *Dubois* is suggestive because *Dubois* itself turned aside an attempt to invoke state-court jurisdiction over Indian country on the ground that federal law barred the exercise of jurisdiction. Specifically, the court held that it did not have "residuary jurisdiction" over a suit by non-Indians against Indians, even if the exercise of jurisdiction were assumed not to infringe on tribal self-governance under *Williams* v. *Lee*, because the tribal consent provisions of the Civil Rights Act of 1968 pre-empted any exercise of state jurisdiction except in accordance with the terms of that Act. 232 N. W. 2d, at 57–59. The court recognized that its holding deprived the plaintiffs of any forum for their suit, but added: "The solution to this most serious problem lies not with the State. Congress may amend its statutes; Indian tribes of this State may begin to assert their own jurisdiction. This State cannot exercise jurisdiction that it does not possess." *Id.*, at 59.[14]

As noted above, the Civil Rights Act of 1968 in no way bars the exercise of jurisdiction in this case. The court's reliance on *Nelson* v. *Dubois* to dismiss petitioner's jurisdictional claim suggests, however, that the court was proceeding on a contrary premise. In that event, it may well have adopted a restrictive interpretation of Chapter 27–19 to avoid a perceived conflict between state and federal jurisdictional mandates.[15] By the same token, *Nelson* v. *Dubois* itself suggests that the court might recognize some measure of "residuary jurisdiction" here but for the mistaken belief that a federal jurisdictional impediment exists. Because we cannot exclude this possibility with any degree of confidence, the prudent course is to give the North Dakota Supreme Court an opportunity to express its views on Chapter 27–19 and thereby "avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.'" *United Air Lines, Inc.* v. *Mahin*, 410 U. S., at 632, quoting *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 443 (1952).

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[14] The court has made even more clear in other cases its view that Pub. L. 280, as amended by the 1968 Civil Rights Act, is an affirmative constraint on state jurisdiction. For example, in *Schantz* v. *White Lightning*, 231 N. W. 2d 812, 815–816 (1975), the court stated:

"*[A]ny* change from the present [jurisdictional] case law would require action by the United States Congress. The appellants are asking this court to assume the duties and responsibilities which are vested solely in the United States Congress. The arguments presented should be addressed to that body.

. . . . .

"The Congress has set out the mandatory procedure to be followed by the Indian Tribes and the State before the States may assume jurisdiction. . . . The Sioux Indians, not having accepted State jurisdiction as permitted and provided for by the congressional mandate and Chapter 27–19, we conclude that the State did not have, nor did it acquire, jurisdiction" (emphasis added).

See *United States ex rel. Hall* v. *Hansen*, 303 N. W. 2d, at 350; *Nelson* v. *Dubois*, 232 N. W. 2d, at 61 (dissenting opinion); *Gourneau* v. *Smith*, 207 N. W. 2d, at 259; see also *Poitra* v. *Demarrias*, 502 F. 2d 23, 27 (CA8 1974), cert. denied, 421 U. S. 934 (1975); *American Indian Agricultural Credit Consortium, Inc.* v. *Fredericks*, 551 F. Supp. 1020, 1021–1022 (Colo. 1982).

Our conclusion that the North Dakota Supreme Court's state-law decision may well have rested on federal law is buttressed by prudential considerations. Were we not to give the North Dakota Supreme Court an opportunity to reconsider its conclusions with the proper understanding of federal law, we would be required to decide whether North Dakota has denied petitioner equal protection under the Fourteenth Amendment by excluding it from state courts in a circumstance in which a non-Indian would be allowed to maintain a suit. It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them. See, *e. g.*, *Leroy*

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[15] In at least one instance, the North Dakota Supreme Court took care not to extend its restrictive jurisdictional holdings to the situation in which an Indian plaintiff brought suit against a non-Indian defendant in state court. See *Schantz* v. *White Lightning*, 231 N. W. 2d, at 814, n. 1 (rejecting broad formulation of jurisdictional issue because it "would require the consideration of a question if an Indian could sue a non-Indian"). The court also once stated flatly that "Indians have the right to sue non-Indians in State courts." *Rolette County* v. *Eltobgi*, 221 N. W. 2d 645, 648 (1974). But see n. 5, *supra*.

v. *Great Western United Corp.*, 443 U. S. 173, 181 (1979); *Massachusetts* v. *Westcott*, 431 U. S. 322, 323 (1977); *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972); *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (concurring opinion); see also *Whalen* v. *United States*, 445 U. S. 684, 702 (1980) (REHNQUIST, J., dissenting). This Court has relied on that principle in similar circumstances to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question. See, *e. g.*, *Black* v. *Cutter Laboratories*, 351 U. S. 292, 299 (1956). The same prudential rule is properly employed in this case. If the North Dakota Supreme Court reinterprets Chapter 27–19 to permit petitioner to maintain its claim in the state courts, or if it concludes that Chapter 27–19 violates the State's Constitution insofar as it bars jurisdiction in this case, neither that court nor this one will be required finally to reach petitioner's federal constitutional challenge. Under these circumstances, our responsibility to avoid unnecessary constitutional adjudication demands that we resolve any uncertainty over the North Dakota Supreme Court's decision in favor of the possibility that it was influenced by a misunderstanding of federal law.[16]

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[16] In addition, the practical cost of mistakenly concluding that federal law influenced the North Dakota Supreme Court's treatment of Chapter 27–19 is far outweighed by the cost of mistakenly reaching the opposite conclusion. If the court's misunderstanding of Pub. L. 280 in fact did not contribute to its interpretation of state law, the court is free to reinstate its former judgment on remand. See, *e. g.*, *United Air Lines, Inc.* v. *Mahin*, 54 Ill. 2d 431, 298 N. E. 2d 161 (1973). In contrast, if the court's understanding of federal law did play a role in its interpretation of Chapter 27–19 but we were to proceed on a contrary assumption, we would be depriving petitioner of a judicial forum that the North Dakota Supreme Court would make available if only it were given another opportunity to address the issue. When the cost of erring in one direction is so negligible and the cost of erring in the other is so great, we think that uncertainty about the federal basis for the state-law decision properly is resolved in favor of the conclusion that federal law played a material role.

III

It is important to recognize what we have not decided in this case today. We have made no ruling that Chapter 27–19 has any meaning other than the one assigned to it by the North Dakota Supreme Court. Neither have we decided whether, assuming that the North Dakota Supreme Court adheres to its current interpretation of Chapter 27–19, application of the statute to petitioner will deny petitioner federal equal protection or violate any other federally protected right. Finally, we have intimated no view concerning the state trial court's jurisdiction over respondent's counterclaim should the North Dakota Supreme Court decide that the trial court does have jurisdiction over petitioner's claim. Instead, we merely vacate the North Dakota Supreme Court's judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

The highest state court in North Dakota has made a decision on the scope of state-court jurisdiction, a decision based on a state statute passed following amendment of the State Constitution. The question is clearly one of state law, immune from our review except in so far as it might be pre-empted by federal law or in conflict with the United States Constitution. The Court today does not say that Chapter 27–19, as interpreted by the North Dakota Supreme Court, is pre-empted by federal law. Nor does the Court find that statute unconstitutional. Yet the Court vacates the judgment below because Pub. L. 280 neither "authorized" nor "required" any disclaimer of pre-existing state jurisdiction.

I do not disagree with the Court's essay on the purpose and effect of Pub. L. 280. But I fail to see its relevance to the state-law issues decided by the court below. Accordingly, I would affirm the judgment of the North Dakota court because the only federal question actually before us—the constitutionality of North Dakota's refusal to exercise jurisdiction over a lawsuit brought by an Indian tribe—is insubstantial.

In Part II–A of its opinion, the Court argues that state-court jurisdiction over this case would have been proper, as a matter of both federal and North Dakota law, prior to the passage of Pub. L. 280 and that nothing in Pub. L. 280 should have changed that situation. In Part II–B, the Court parlays the eclipse of this "residual jurisdiction" into a reason for concluding that the North Dakota Supreme Court may have misunderstood Pub. L. 280 when it interpreted Chapter 27–19. The linchpin of the entire argument is the 1957 case of *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432, in which the North Dakota court took an expansive view of the scope of state-court jurisdiction over suits by and against Indians in Indian country. The Court today correctly states that the jurisdiction claimed in *Vermillion*—over all civil actions arising in Indian country, except those involving interests in Indian lands—would embrace this case. *Ante*, at 147. But the argument for residual jurisdiction which the Court constructs around *Vermillion* is wholly untenable for the simple reason that the expansive jurisdiction of *Vermillion* was discredited, two years after it was claimed, by our decision in *Williams* v. *Lee*, 358 U. S. 217 (1959).

Both the specific holding and the broad dictum of *Vermillion* were pre-empted by *Williams* v. *Lee*.[1] The North Dakota court exercised jurisdiction in *Vermillion* over a suit arising out of a car accident on an Indian reservation in which all the parties were reservation Indians. The principles of tribal autonomy recognized in *Williams* v. *Lee* clearly preclude such an intrusion into strictly tribal affairs without affirmative legislative action pursuant to Pub. L. 280. See *Fisher* v. *District Court*, 424 U. S. 382 (1976). And the expansive claim made in *Vermillion* to jurisdiction over all civil actions arising in Indian country, except those involving interests in Indian lands, cannot be squared with the requirement that such jurisdiction be assumed by legislative action pursuant to Pub. L. 280.

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[1] In *Williams*, a non-Indian who operated a store on an Indian reservation in Arizona sued an Indian couple to collect goods sold to them on credit. We held that principles of tribal autonomy precluded the Arizona courts from entertaining the suit in the absence of an affirmative assumption of jurisdiction by the state legislature. 358 U. S., at 222.

In short, at the time Chapter 27–19 was passed, four years after *Williams* v. *Lee*, *Vermillion* was not in any sense good law. The "lawfully assumed jurisdiction," *ante*, at 150, which the Court thinks must have survived both Pub. L. 280 and Chapter 27–19, was in fact unlawfully assumed and therefore invalid. The fact that Chapter 27–19 appears to expand state jurisdiction over Indian country rather than to contract it must be understood, not in light of *Vermillion*, but in light of the intervening, superseding decision of this Court in *Williams* v. *Lee*. The North Dakota Legislature was effectively starting from "square one" in asserting jurisdiction over civil actions in Indian country when it passed Chapter 27–19. Thus, since the assumption of jurisdiction in Chapter 27–19 was predicated on tribal consent, which has not been forthcoming, the North Dakota Supreme Court could naturally and properly conclude that there was no state-court jurisdiction in this case.[2]

The Court glosses over this obvious difficulty in its argument by simply recasting *Vermillion* to fit its needs.

> "To be sure the full breadth of state-court jurisdiction recognized in *Vermillion* cannot be squared with principles of tribal autonomy; to the extent that *Vermillion* permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians or

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[2] In *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 495 (1979), we held that "any option State can condition the assumption of full jurisdiction on the consent of an affected tribe" even though not required to do so by Pub. L. 280.

> over claims between Indians, it intruded impermissibly on tribal self-governance. . . . This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country." *Ante,* at 148.

In accordance with its view of what the North Dakota courts could have done compatibly with federal law, the Court proceeds to treat *Vermillion* as if it had in fact only claimed jurisdiction over suits by Indians against non-Indians. Thus, the Court says that nothing in Pub. L. 280 "required North Dakota to disclaim the basic jurisdiction recognized in *Vermillion* or authorized it to do so," *ante,* at 150, and that "no federal law or policy required the North Dakota courts to forgo the jurisdiction recognized in *Vermillion* in this case," *ante,* at 151. The Court even refers to the jurisdiction of *Vermillion* as "otherwise lawfully assumed jurisdiction." *Ante,* at 150.

I must confess to being nonplussed by the Court's treatment of *Vermillion.* It seems strange, indeed, to suppose that *Vermillion* is in some sense good law—when neither its holding nor its reasoning is acceptable under federal law—merely because the opinion would be acceptable if it had been written altogether differently and reached an opposite result. The fact remains that it was not written differently and did not reach the opposite result.

The North Dakota court improperly tried to assert jurisdiction over *all* civil actions arising in Indian country, except those involving interests in Indian lands. That attempt having failed, there is no indication that North Dakota would have accepted the one-way jurisdiction sought by petitioner in this case, whereby Indians can sue non-Indians but not vice versa. And the fact that our cases would have *permitted* the assumption of such jurisdiction is simply beside the point. Nothing in the Enabling Act, the State Constitution, or Pub. L. 280 compelled North Dakota to grant Indians the right to sue non-Indians in state court in situations where non-Indians could not sue Indians. And it is sheer speculation to suppose that the State would have done so.[3]

Without *Vermillion* the Court's argument in Part II–B simply crumbles. For without some sort of plausible "residual jurisdiction" that would cover this case, Pub. L. 280 constitutes an affirmative bar to the assumption of jurisdiction by the North Dakota court. Any jurisdiction over Indian country assumed by an option State following passage of Pub. L. 280 must be assumed in accordance with the requirements of Pub. L. 280. It must be assumed, that is, by affirmative legislative action; state courts are powerless to act on their own initiative. As we stated in *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 427 (1971):

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[3] The North Dakota court's subsequent treatment of *Vermillion* provides a strong indication that the court would never, as a matter of state law, have recognized the one-sided jurisdiction sought by petitioner and permitted by federal law. As noted, the jurisdiction claimed in *Vermillion* under state law was invalid under *Williams* v. *Lee* as pre-empted by federal law. That same jurisdiction was also disclaimed as a matter of state law by the passage of Chapter 27–19. See 321 N. W. 2d 510, 511 (N. D. 1982).

Chapter 27–19 provides that "jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter." N. D. Cent. Code § 27–19–01 (1974). A later provision excepts from this jurisdiction suits involving interests in Indian lands. § 27–19–08. Thus, the jurisdiction which North Dakota stands ready to accept under Chapter 27–19 is exactly coterminous with that claimed in *Vermillion*.

If *Vermillion* had been good law, Chapter 27–19 would have been entirely superfluous. Following the passage of Chapter 27–19, therefore, the North Dakota court could reasonably conclude that the legislature had disclaimed (*i. e.*, renounced any claim to) the jurisdiction wrongfully usurped in *Vermillion* except on consent of the affected tribes. And the fact that the court concluded that *all* the jurisdiction of *Vermillion* had been disclaimed indicates that, as a matter of state law, the court views the jurisdiction of *Vermillion* as an all-or-nothing, reciprocal proposition. Again, it is irrelevant that our cases would have *permitted* the State to assert one-sided, residual jurisdiction. The State was not obliged to accept the invitation.

> "[T]he requirement of affirmative legislative action [was not] an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities."

North Dakota took affirmative legislative action in passing Chapter 27–19, but conditioned its assumption of jurisdiction on tribal consent. Since that consent has not been forthcoming, North Dakota has not assumed any additional jurisdiction over Indian country under Pub. L. 280. See *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 499 (1979). North Dakota courts therefore have no authority to unilaterally augment their jurisdiction by entertaining suits either by or against Indians in actions arising on Indian lands. *Fisher* v. *District Court*, 424 U. S., at 388–389; *Kennerly*, *supra*, at 427.[4] Unless, therefore, such jurisdiction was "assumed prior to and apart from Pub. L. 280," *ante*, at 151, an assumption I find untenable for the reasons given, Pub. L. 280 precludes the exercise of jurisdiction in this case.[5]

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[4] For this reason, the Court's reliance on *Nelson* v. *Dubois*, 232 N. W. 2d 54 (N. D. 1975), and *Schantz* v. *White Lightning*, 231 N. W. 2d 812 (N. D. 1975), see *ante*, at 155–156, and n. 14, for the proposition that the North Dakota Supreme Court may have misread federal law is misplaced. In so far as North Dakota has not already assumed lawful jurisdiction over suits arising in Indian country, either prior to Pub. L. 280 or pursuant to the terms of that statute, federal law does act "as an affirmative bar to the exercise of jurisdiction here," *ante*, at 155.

[5] Obviously, if Pub. L. 280 would preclude a judicial assumption of jurisdiction in this case, then the North Dakota Supreme Court properly disposed of petitioner's equal protection argument with a simple citation to *Washington* v. *Yakima Indian Nation*, 439 U. S., at 500–501, in which we rejected a similar challenge to a Washington statute which conditioned

I might finally add that even if one did posit a truncated *Vermillion* as somehow providing the residual jurisdiction necessary to the Court's argument until eclipsed by the North Dakota Legislature, there is still no indication and the Court offers no good reason to believe that the North Dakota Supreme Court interpreted Chapter 27–19 under any misapprehensions about Pub. L. 280. The North Dakota court in fact shows a perfectly clear appreciation of both the purpose and effect of Pub. L. 280.

> "The purpose of Public Law 280 was to facilitate the transfer of jurisdictional responsibility to the states. *Washington* v. *Confederated Bands and Tribes*, 439 U. S. 463, 505 (1979). It permitted states to amend their constitutions or existing statutes to remove any legal impediments to the assumption of civil and criminal jurisdiction, and thereby to unilaterally assume jurisdiction over criminal and civil matters within the exterior boundaries of Indian reservations within the states taking such action." 321 N. W. 2d 510, 511 (1982).

This statement of the law is unexceptionable. Indeed, the Court's own statement of the purpose and effect of Pub. L. 280, see *ante*, at 150, reads like a paraphrase of the above passage.

The North Dakota court never even remotely implies that Pub. L. 280 "required" the State to eliminate any pre-existing, lawfully assumed jurisdiction. The focus is rather on the passage of Chapter 27–19 by the state legislature. See n. 3, *supra*. And as to whether the court may have mistakenly thought that Pub. L. 280 "authorized" such a disclaimer of jurisdiction by the State, I cannot see how that question is relevant at all. Either a disclaimer of pre-existing jurisdiction was forbidden by federal law or it was not. If not, and

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state jurisdiction over Indian lands in some subject-matter areas on Indian consent. It would also follow that the lower court's handling of the equal protection claim does not, as the Court would have it, *ante*, at 154, reflect any misunderstanding of federal law.

the majority does not imply that it was, then there is no additional requirement that it be affirmatively sanctioned. A State is not obliged to play "Mother, may I" with the Federal Government before retroceding jurisdiction that, under our cases, could have been retained.

In my view, therefore, the only federal question presented in this case is whether North Dakota's failure to permit Indians to sue non-Indians in circumstances under which non-Indians could not sue Indians violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After our decision in *Washington* v. *Yakima Indian Nation*, *supra*, that question is not a substantial one. See n. 5, *supra*. Access to the North Dakota courts is within the power of petitioner. The Tribe need merely consent to the full civil jurisdiction which North Dakota, pursuant to Pub. L. 280, stands ready to offer them. Petitioner wants to enjoy the full benefits of the state courts as plaintiff without ever running the risk of appearing as defendant. The Equal Protection Clause mandates no such result.

I respectfully dissent.

UNITED STATES *v.* LORENZETTI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-838. Argued April 23, 1984—Decided May 29, 1984

Respondent, a Federal Government employee injured in an automobile accident in Pennsylvania while on official business, received payment from the Government under the Federal Employees' Compensation Act (FECA) for his medical expenses and lost wages. Under FECA, the Government is not liable for losses such as pain and suffering. Respondent subsequently instituted a tort action in a Pennsylvania state court against the driver of the other automobile. Such an action is generally limited under the Pennsylvania No-fault Motor Vehicle Insurance Act to recovery for noneconomic losses like pain and suffering. After respondent eventually settled the case for a sum that represented compensation for noneconomic losses alone, the United States sought to be reimbursed for its FECA payments out of the settlement, asserting that it was entitled to reimbursement pursuant to the provision of FECA (5 U. S. C. § 8132) prescribing that whenever a federal employee suffers injury or death compensable under FECA "under circumstances creating a legal liability in a person other than the United States to pay damages," and the employee or his beneficiaries receive "money or other property in satisfaction of that liability as the result of suit or settlement," they "shall refund to the United States the amount of compensation paid by the United States." Respondent declined to pay over the requested sum and commenced an action in Federal District Court, seeking a declaratory judgment that the Government's right of reimbursement under § 8132 was confined to recovery out of damages awards or settlements for economic losses of the sort covered by FECA, and that an award or settlement confined to noneconomic losses like pain and suffering was immune from recovery under § 8132. The District Court granted summary judgment to the United States, but the Court of Appeals reversed.

Held: Section 8132 entitles the United States to be reimbursed for FECA compensation out of any damages award or settlement made in satisfaction of third-party liability for personal injury or death, regardless of whether the award or settlement is for losses other than medical expenses and lost wages. On its face, the statute does not confine the United States to the rights of a subrogee with respect to the specific classes of expenses paid by it to injured employees under FECA; instead, it expressly creates a general right of reimbursement that obtains without regard to whether the employee's third-party recovery includes losses that are excluded from FECA coverage. This reading of § 8132 is reinforced by the parallel terms of § 8131, which governs the right of the United States itself to prosecute an employee's third-party action. And nothing in FECA's legislative history establishes that § 8132 means something less than what it says. While no-fault automobile insurance statutes were not in existence when FECA was enacted in 1916, the possibility that third-party recoveries might encompass compensation for pain and suffering was well known, and Congress has not subsequently acted to restrict the types of third-party recoveries from which the United States may obtain reimbursement. Nor is there any inconsistency between the interpretation of § 8132 adopted here and the underlying purposes of the provision. Pp. 173–179.

710 F. 2d 982, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Carolyn F. Corwin argued the cause for the United States. With her on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, William Kanter,* and *Freddi Lipstein.*

Charles Sovel argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

The Federal Employees' Compensation Act (FECA), 5 U. S. C. § 8101 *et seq.*, provides a comprehensive system of compensation for federal employees who sustain work-related injuries. As part of that system, an employee who receives FECA payments is required to reimburse the United States for those payments, to a specified extent, when he obtains a damages award or settlement from a third party who is liable to the employee for his injuries. § 8132. The question presented by this case is whether the United States may recover FECA payments for medical expenses and lost wages from an employee whose third-party tort recovery compensates him solely for noneconomic losses like pain and suffering.

I

The facts are clear. Respondent Paul B. Lorenzetti is a special agent for the Federal Bureau of Investigation. On November 21, 1977, he was injured in an automobile accident in Philadelphia while on official business. Federal employees who are injured while engaged in the performance of their official duties are entitled under FECA to compensation for medical expenses, lost wages, and vocational rehabilitation. See §§ 8102–8107. Respondent's injuries were not serious enough to require vocational rehabilitation, but he eventually received, from the Federal Employees' Compensation Fund, the sum of $1,970.81 for his medical expenses and lost wages. See § 8147. Because the United States' liability for work-related injuries under FECA is exclusive, see § 8116(c), respondent cannot recover from the United States for losses such as pain and suffering that are not compensated under FECA.

Respondent subsequently instituted a tort action in a Pennsylvania state court against the driver of the other automobile. Respondent's action was subject to the terms of the Pennsylvania No-fault Motor Vehicle Insurance Act (No-fault Act), Pa. Stat. Ann., Tit. 40, § 1009.101 *et seq.* (Purdon Supp. 1984–1985), which substantially alters conventional tort liability for automobile accidents. Under the No-fault Act, an accident victim must look to his own insurance carrier to cover basic economic losses, including an unlimited amount of medical expenses and up to $15,000 in lost wages. §§ 1009.104, 1009.106, 1009.202. The victim may maintain a tort action against the driver of the other automobile, but his recovery is generally limited to noneconomic losses like pain and suffering; he may recover damages for economic losses only to the extent that they are not otherwise compensated because they exceed statutory limits (such as the $15,000 lost-wage ceiling) under the No-fault Act. §§ 1009.301(a)(4) and (a)(5). In this case, respondent's medical expenses and lost wages had been compensated fully by the Federal Government under FECA. As a result, the driver of the other vehicle moved to exclude evidence of medical expenses and lost wages from the trial. The trial court did not rule formally on that motion but indicated its agreement that respondent was confined to recovering damages for noneconomic losses. Respondent eventually settled the case for $8,500, a figure that represented compensation for noneconomic losses alone.

The United States thereafter sought to be reimbursed for its FECA payments out of respondent's tort settlement.[1] FECA contains several provisions designed to shift the compensation burden from the United States to any third party who is independently liable for the employee's injuries. Under § 8131, if an accident for which the United States is liable under FECA also creates a legal liability in a person other than the United States to pay damages, the Secretary of Labor may require the employee either to prosecute an action in his own name against the third party or to assign to the United States his right of action to enforce the liability. When an employee maintains an action in his own name, the United States is entitled to be reimbursed for its FECA payments in accordance with § 8132. This statute in relevant part reads:

> "If an injury or death for which compensation is payable under [FECA] is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of

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[1] After deducting the Government's share of a reasonable attorney's fee, see 5 U. S. C. § 8132, the United States arrived at a reimbursement figure of $1,620.24. This roughly represents one-fifth of the sum received by respondent in the settlement of his third-party action.

> suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury."[2]

The United States asserted that it was entitled to reimbursement for its FECA payments in this case pursuant to § 8132.

Respondent declined to pay over the requested sum and, instead, commenced a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania. He sought a declaration that the United States' right of reimbursement under § 8132 was confined to recovery out of damages awards or settlements for economic losses of the sort covered by FECA, and that an award or settlement confined to noneconomic losses like pain and suffering was immune from recovery under § 8132. In opposition, the United States took the position that § 8132 created a general right of reimbursement not conditioned on the nature of the loss for which an employee received payment in his tort action.

The District Court granted summary judgment to the United States. 550 F. Supp. 997 (1982). The District Court relied principally on *Ostrowski* v. *United States Dept. of Labor, Office of Workers Compensation Programs*, 653 F. 2d 229 (CA6 1981), aff'g *Ostrowski* v. *Roman Catholic Archdiocese of Detroit*, 479 F. Supp. 200 (ED Mich. 1979), in which the Court of Appeals for the Sixth Circuit had been presented with the identical question by virtue of a similar Michigan no-fault statute and had resolved the issue in favor of the Government. Like the courts in *Ostrowski*, the District Court here looked to the language of § 8132 itself. It observed: " 'There is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not.' " 550 F. Supp., at 999, quoting *Ostrowski*, 479 F. Supp., at 203. Instead, the duty to reimburse encompassed all damages recovered from third parties. The District Court found further support for its reading of § 8132 both in the regulations promulgated by the Secretary of Labor under § 8132 and in the legislative history, which indicated that Congress had been aware of the possibility of third-party tort recoveries for noneconomic harms yet had taken no action to confine the scope of the statute. 550 F. Supp., at 1000.

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[2] Section 8132 further provides that no person shall make distribution to an employee pursuant to a damages judgment or settlement without first satisfying the United States' reimbursement interest. The federal right of reimbursement under § 8132 is subject to one significant limitation: regardless of the extent of his FECA receipts, an employee is entitled to retain one-fifth of the net amount of the recovery after the expenses of the suit have been deducted. The same protection is available under § 8131(c) when the Secretary of Labor prosecutes an assigned right of action on behalf of the United States.

On appeal, the United States Court of Appeals for the Third Circuit reversed. 710 F. 2d 982 (1983). Unlike the District Court, the Court of Appeals made only passing references to the language of § 8132. It reasoned that, because § 8132 was enacted prior to the advent of no-fault statutes, "Congress could not have anticipated this scenario" and the statute "does not speak to this situation." *Id.*, at 985. The Court of Appeals addressed itself instead to what it deemed to be the underlying purposes of § 8132 and FECA. In the Court of Appeals' view, the purpose of § 8132 was twofold: to prevent federal employees from obtaining double recoveries and to minimize the cost of FECA to the Federal Government. *Id.*, at 984. These goals, in turn, were subject to FECA's overarching aim of treating federal employees " 'in a fair and equitable manner.' " *Id.*, at 985, quoting S. Rep. No. 93–1081, p. 2 (1974).

The Court of Appeals rejected the District Court's reading of § 8132 on the ground that it would not serve the purposes of the statute and would be "manifestly unfair" to federal employees subject to no-fault statutes. 710 F. 2d, at 985. The goal of preventing double recovery does not require that the

United States be reimbursed when an employee's tort recovery under a no-fault statute is limited to noneconomic damages, since the Commonwealth's statutory scheme guarantees that the employee's recovery does not include payment for elements of loss covered by FECA. At the same time, allowing the United States to obtain reimbursement out of a tort recovery for noneconomic loss would frustrate the congressional goal of treating federal employees fairly and equitably, for the Pennsylvania workmen's compensation statute does not impose a parallel obligation on private employees to make reimbursements in the same circumstances. *Id.*, at 985–986. The Court of Appeals found nothing in the legislative history of FECA or the regulations promulgated by the Secretary of Labor under § 8132 that made it improper to read § 8132 analogously to the Commonwealth's workmen's compensation statute. *Ibid.* The Court of Appeals recognized, however, that its interpretation of § 8132 was squarely inconsistent with that of the Court of Appeals for the Sixth Circuit in *Ostrowski.* 710 F. 2d, at 984.

We granted certiorari to resolve the conflict over the scope of the United States' right of reimbursement under § 8132. 464 U. S. 1068 (1984). We now reverse.

II

The answer to the question presented here is evident on the face of the statute, it seems to us, for § 8132 by its own terms requires respondent to reimburse the United States for the disputed sum. Section 8132 provides that whenever a federal employee suffers injury or death compensable under FECA "under circumstances creating a legal liability in a person other than the United States to pay damages," and the employee or his beneficiaries receive "money or other property in satisfaction of that liability," they "shall refund to the United States the amount of compensation paid by the United States." We find little room for confusion about the meaning of this language. Section 8132 imposes only two conditions precedent to an employee's obligation to "refund . . . the amount of compensation paid by the United States." The first is that the employee must have suffered an injury or death under circumstances creating a legal liability in a third party to pay damages. The second is that the employee or his beneficiaries must have received money or other property in satisfaction of that liability. Here, both conditions have been met: respondent was injured in an automobile accident that gave rise to third-party liability, and he received $8,500 in satisfaction of his claim for damages. As a result, the United States is entitled to reimbursement for amounts paid to respondent for medical expenses and lost wages. Contrary to respondent's argument, § 8132 does not confine the United States to the rights of a subrogee with respect to the specific classes of expenses paid by it to injured employees under FECA; instead, it expressly creates a general right of reimbursement that obtains without regard to whether the employee's third-party recovery includes losses that are excluded from FECA coverage.[3]

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[3] Respondent argues that § 8132 is inherently ambiguous because the term "damages" bears several readings. In particular, respondent suggests that "damages" could be read literally to encompass not only liability for death or personal injury but liability for property damages as well. Respondent argues that the provision cannot have been meant to create a right of reimbursement out of an employee's recovery for property damages, and hence that the literal language of § 8132 leads to unintended results unless it is informed with the congressional policies on which the Court of Appeals relied.

We agree that § 8132 does not include a right of reimbursement out of third-party compensation for property damages, but we disagree that the statutory reference to "damages" contains any ambiguity that must be dispelled to reach that conclusion. The term "damages" clearly refers back to the "injury or death" that gives rise to the third party's legal liability, thereby excluding reimbursement out of any property-damages recovery. Section 8132's predecessor provision was even clearer in this regard, for it stated that the United States' right of reimbursement arose "if an injury or death for which compensation is payable . . . is caused under circumstances

This reading of § 8132 is reinforced by the parallel terms of § 8131, which governs the right of the United States itself to prosecute an employee's third-party action. Section 8131(a)(1) requires an employee, at the discretion of the Secretary of Labor, to "assign to the United States *any* right of action he may have to enforce [a third-party] liability" arising from the employee's accident (emphasis added). This obligation to assign causes of action arising from accidents covered by FECA is an unqualified one; the statute does not excuse an employee whose only cause of action is for elements of loss that are not compensable under FECA. See H. R. Rep. No. 678, 64th Cong., 1st Sess., 11 (1916) (an injured employee or his beneficiary may be required to assign "*any* right of action" against a third party whose tortious conduct caused the injury (emphasis added)). In turn, the Secretary of Labor is authorized to prosecute or compromise any cause of action so assigned and to "deduct [from any recovery] and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary," reserving for the employee or his beneficiaries not less than one-fifth of the award or settlement. § 8131(c). There is no question but that the Secretary of Labor could have required respondent to assign his cause of action against the other driver to the United States, on pain of forfeiting his FECA compensation if he refused to do so, § 8131(b), and could have maintained the action directly for the benefit of the United States. Respondent has not explained why this result is unwarranted under § 8131 or why

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creating a legal liability in some person other than the United States to pay damages *therefor*. . . ." Act of Sept. 7, 1916, ch. 458, § 27, 39 Stat. 747–748 (emphasis added), repealed by Pub. L. 89–554, § 8(a), 80 Stat. 632, 643. The use of the term "therefor" demonstrates Congress' intent that "damages" refer back to the phrase "injury or death." "Therefor" was omitted when the original provision was replaced by § 8132 in 1966, but the omission was not meant to be a substantive change. See Pub. L. 89–554, § 7(a), 80 Stat. 631.

§ 8132 should be construed to diminish the scope of the United States' reimbursable interest when a third-party action is maintained by the employee himself.[4]

Nothing in FECA's legislative history persuades us that § 8132 means something less than what it says. FECA was enacted in 1916 as the first comprehensive injury-compensation statute for federal employees. Act of Sept. 7, 1916, ch. 458, 39 Stat. 742, repealed by Pub. L. 89–554, § 8(a), 80 Stat. 632, 643. Section 27 of the original statute vested the United States with a right of reimbursement in terms that do not differ materially from the relevant portions of § 8132 today.[5] The section was adopted "not for the purpose of increasing [FECA] compensation, but for the purpose of reimbursing the Government for payments made and indemnifying it against other amounts payable in the future." *Dahn* v. *Davis*, 258 U. S. 421, 430 (1922). At no point did Congress suggest in its deliberations that the federal right of reimbursement was to be limited to particular categories of third-party recoveries for injury or death. While no-fault automobile insurance statutes were not in existence in 1916, the possibility that third-party recoveries might encompass compensation for pain and suffering was well known, see, *e. g.*, 53 Cong. Rec. 10909–10910 (1916) (remarks of Rep. Barkley); yet no effort was made to reduce the breadth of the statutory language to insulate such compensation from recovery by the United States. Congress subsequently provided added protection for employees under § 8132, most notably by reserving one-fifth of the net third-party recovery for the employee, see Pub. L. 89–488, § 10, 80 Stat. 255, but at no point has it acted to restrict the types of third-party recoveries from which the United States may obtain reimbursement.

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[4] Respondent does argue that § 8131 provides nothing more than an alternative means for the United States to enforce an interest in an employee's claim for medical expenses and lost wages. The language of § 8131, however, is no more subject to this strained interpretation than is the language of § 8132.

[5] Section 27 provided:

"[I]f an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received [as a refund to the United States for FECA payments already made and as a credit for unmatured FECA obligations arising from the same injury]."

Neither do we find any inconsistency between the interpretation of § 8132 rejected by the Court of Appeals and the underlying purposes of the provision. Admittedly, the goal of preventing double recoveries by injured employees does not demand that an employee in respondent's position turn over a third-party payment confined to compensation for pain and suffering. As the Court of Appeals itself recognized, however, the purpose of § 8132 is not simply to prevent double recoveries but to minimize the cost of the FECA program to the Federal Government. See *Dahn* v. *Davis*, 258 U. S., at 430; cf. H. R. Rep. No. 678, *supra*, at 13–14. It is self-evident that the latter goal is directly advanced by allowing the United States to obtain reimbursement out of any third-party recovery, regardless of whether the third-party recovery includes compensation for losses other than medical expenses and lost wages. When Congress has chosen to subordinate the goal of minimizing FECA expenditures to other concerns, as it did when it amended § 8132 to reserve one-fifth of the net third-party recovery for the employee, it has done so explicitly. We are not at liberty to fashion an additional limitation on that goal without express authorization from Congress.

The Court of Appeals believed that allowing the United States to recover in this case would be inconsistent with Congress' declared intent that federal employees "be treated in a fair and equitable manner" under FECA and that the United

States "strive to attain the position of being a model employer." S. Rep. No. 93–1081, p. 2 (1974). However useful these general statements of congressional intent may be in resolving ambiguities in the statutory scheme, they are not a license to ignore the plain meaning of a specific statutory provision. The language relied on by the Court of Appeals concerned a wide variety of amendments to FECA enacted in 1974, none of which materially altered the balance struck in § 8132 between the interests of employees and the interests of the Federal Government. In addition, as this case amply demonstrates, any unfairness or inequity arises not from the operation of § 8132 alone but from the provision's interaction with distinct state statutory schemes. Even if Congress' desire that the United States be "a model employer" were a sufficient basis for interpreting § 8132 to avoid intrinsic inequities, it hardly would be a sufficient basis for inferring that Congress meant to sacrifice the substantial federal interest in reimbursement in order to avoid extrinsic complications introduced by independent state legislative actions. Nor is it true, as the Court of Appeals seemed to believe, that interpreting § 8132 to require reimbursement here will leave federal employees systematically worse off than their counterparts in the private sector; the prevailing rule under state workmen's compensation statutes is that an employer is fully entitled to be reimbursed from third-party recoveries for pain and suffering, even when the portion of an award attributable to pain and suffering is clearly separable from the portion attributable to economic losses. See 2A A. Larson, The Law of Workmen's Compensation § 74.35, pp. 14–476 to 14–478 (1982).

The Court of Appeals also sought to justify its conclusion on the ground that Congress could not have anticipated the adoption of no-fault automobile insurance statutes and the attendant restriction on third-party tort liability for economic losses. As pointed out above, the fact that Congress could not foresee no-fault statutes does not mean that Congress did not foresee the risk that federal reimbursement rights would trench on third-party recoveries for noneconomic losses. More important, the fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account. See *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U. S. 624, 635–636 (1983). It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of changing social conditions. Congress simply has not done so here.

III

For these reasons, we hold that § 8132 entitles the United States to be reimbursed for FECA compensation out of any damages award or settlement made in satisfaction of third-party liability for personal injury or death, regardless of whether the award or settlement is for losses other than medical expenses and lost wages. The judgment of the Court of Appeals, accordingly, is reversed.

It is so ordered.

UNITED STATES *v.* GOUVEIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-128. Argued March 20, 1984—Decided May 29, 1984

Four of the respondents, who were all inmates in a federal prison, were placed in administrative detention in individual cells during the investigation of the 1978 murder of a fellow inmate. They remained in administrative detention without appointed counsel for approximately 19 months before their indictment on federal criminal charges and their arraignment in Federal District Court, when counsel was appointed for them. The District Court denied their motion to dismiss the indictment on the asserted ground that their administrative confinement without appointed counsel violated their Sixth Amendment right to counsel, and they were ultimately convicted of murder. The other two respondents were placed in administrative detention without appointed counsel for approximately eight months during the investigation of a 1979 murder of another inmate. Counsel was appointed for them and they were released from administrative detention when they were arraigned on a federal indictment. They were also ultimately convicted of murder over their contention that the preindictment administrative confinement violated their Sixth Amendment right to counsel. On consolidated appeals, the Court of Appeals reversed. Although recognizing that a plurality of this Court had concluded in *Kirby* v. *Illinois*, 406 U. S. 682, that the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing, the Court of Appeals noted that *Kirby* was not a prison case, and concluded that an indigent inmate who is the subject of a felony investigation and who is isolated in administrative detention for more than 90 days, must be afforded counsel after 90 days or else be released back into the prison population.

Held: Respondents were not constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them. Pp. 187-192.

(a) The right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. Cf. *Kirby* v. *Illinois*, *supra*, at 688-689. This interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the

Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes that the right to counsel serves, including assuring aid at trial and at "critical" pretrial proceedings when the accused is confronted with the intricacies of criminal law or with the expert advocacy of the public prosecutor, or both. Pp. 187–189.

(b) The Court of Appeals' analogy to Sixth Amendment speedy trial cases—which hold that that Sixth Amendment right may attach as early as the time of arrest—is inapt. The speedy trial right and the right to counsel protect different interests, and any analogy between an arrest and an inmate's administrative detention pending investigation is not relevant to a proper determination of when the right to counsel attaches. Pp. 189–190.

(c) The Court of Appeals' holding also confuses the purpose of the right to counsel with purposes that are served by the Fifth Amendment due process guarantee and the statutes of limitations applicable to the particular crime being investigated. The court was concerned with affording protection against the possibility that the Government might delay the initiation of formal charges while it developed its case against the isolated and unaided inmate, during which time physical evidence might deteriorate, witnesses' memories might dim, and alibi witnesses might be transferred to other facilities. Such concerns, while legitimate ones, do not implicate the right to counsel. Providing a defendant with a preindictment private investigator is not a purpose of the right to counsel. Pp. 191–192.

704 F. 2d 1116, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 193. MARSHALL, J., filed a dissenting opinion, *post*, p. 199.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Carolyn F. Corwin*, and *John F. De Pue*.

Charles P. Diamond, by appointment of the Court, 464 U. S. 1035, argued the cause for respondents Mills et al. With him on the brief were *M. Randall Oppenheimer* and *Edwin S. Saul*. *Joel Levine*, by appointment of the Court, 464 U. S. 1035, argued the cause for respondents Gouveia et al. and filed a brief for respondent Segura. *Joseph F. Walsh*, by appointment of the Court, 464 U. S. 1035, filed a brief for respondent Ramirez. *Michael J. Treman*, by appointment of the Court, 464 U. S. 1035, filed a brief for respondent Gouveia. *Manuel U. A. Araujo* filed a brief for respondent Reynoso.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents William Gouveia, Robert Ramirez, Adolpho Reynoso, and Philip Segura were convicted of murdering a fellow inmate at a federal prison in Lompoc, Cal. Respondents Robert Mills and Richard Pierce were convicted of a later murder of another inmate at the same institution. Prison officials placed each respondent in administrative detention shortly after the murders, and they remained there for an extended period of time before they were eventually indicted on criminal charges. On appeal of respondents' convictions, the en banc Court of Appeals for the Ninth Circuit held by divided vote that they had a Sixth Amendment right to an attorney during the period in which they were held in administrative detention before the return of indictments against them, and that because they had been denied that right, their convictions had to be overturned and their indictments dismissed. 704 F. 2d 1116 (1983). We granted certiorari to review the Court of Appeals' novel application of our Sixth Amendment precedents, 464 U. S. 913 (1983), and we now reverse.

On November 11, 1978, Thomas Trejo, an inmate at the Federal Correctional Institution in Lompoc, Cal., was found dead from 45 stab wounds in the chest. Prison officials and agents from the Federal Bureau of Investigation began inde-

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation by *Richard F. Ziegler* and *Charles S. Sims;* and for the National Legal Aid and Defender Association by *Richard J. Wilson.*

pendent investigations of the murder. Prison officials immediately suspected respondents Reynoso and Gouveia and placed them in the Administrative Detention Unit (ADU) at Lompoc. They were released back into the general prison population on November 22, 1978, but after officials obtained further information about the murder, on December 4, 1978, they returned Reynoso and Gouveia to the ADU, and placed respondents Segura and Ramirez in the ADU as well. Later in December, prison officials held disciplinary hearings, determined that all four respondents had participated in the murder of inmate Trejo, and ordered their continued confinement in the ADU. While in the ADU, respondents were separated from the general prison population and confined to individual cells. Although their participation in various prison programs was curtailed, they were still allowed regular visitation rights, exercise periods, access to legal materials, and unmonitored phone calls. 704 F. 2d, at 1118; see generally 28 CFR §§ 541.19, 541.20(d) (1983). Respondents remained in the ADU without appointed counsel for approximately 19 months. On June 17, 1980, a federal grand jury returned an indictment against respondents on charges of first-degree murder and conspiracy to commit murder in violation of 18 U. S. C. §§ 1111 and 1117 respectively. On July 14, 1980, respondents were arraigned in federal court, at which time a Federal Magistrate appointed counsel for them.

Before trial respondents filed a motion to dismiss their indictments, arguing that the delay of approximately 19 months between the commission of the crime and the return of the indictments violated their due process rights under the Fifth Amendment or, alternatively, their Sixth Amendment right to a speedy trial, and that their confinement in the ADU without appointment of counsel during that period violated their Sixth Amendment right to counsel. The District Court for the Central District of California denied their motion, and respondents proceeded to trial. Their first trial, which lasted approximately four weeks, ended in a mistrial. On retrial, respondents were convicted on both counts and were sentenced to consecutive life and 99-year terms of imprisonment.

The scenario is much the same in the case of Mills and Pierce. Inmate Thomas Hall was stabbed to death at Lompoc on August 22, 1979. Immediately afterwards Mills and Pierce were examined by a prison doctor and questioned by FBI agents regarding the murder. Prison officials suspected them of involvement in the murder and placed them in the ADU pending further investigation. On September 13, 1979, prison officials conducted a disciplinary hearing, concluded that respondents had murdered inmate Hall, and ordered their continued confinement in the ADU where they remained for the next eight months. On March 27, 1980, a federal grand jury returned an indictment against Mills and Pierce on charges of first-degree murder in violation of 18 U. S. C. § 1111 and of conveyance of a weapon in prison in violation of 18 U. S. C. § 1792, and against Pierce on a charge of assault in violation of 18 U. S. C. § 113(c). At the time of their arraignment on April 21, 1980, Mills and Pierce were appointed counsel and were released from the ADU.

Before trial Mills and Pierce also filed a motion to dismiss their indictments, alleging that the 8-month preindictment delay violated their Fifth Amendment due process rights and their Sixth Amendment speedy trial right, and that their confinement without counsel for that period violated their Sixth Amendment right to counsel. The District Court for the Central District of California granted the motion to dismiss. A panel of the Court of Appeals for the Ninth Circuit reversed and remanded for trial, holding that respondents' Sixth Amendment rights were not triggered during their administrative segregation because they had not yet been arrested and accused, and that respondents had made an insufficient showing of actual prejudice from the preindictment delay so as to justify dismissal of the indictments on due process grounds. *United States* v. *Mills*, 641 F. 2d 785, cert. denied, 454 U. S. 902 (1981). Respondents Mills and

Pierce were then convicted on all counts and sentenced to life imprisonment.

The Court of Appeals, proceeding en banc, consolidated the appeals of all six respondents and addressed only the issue of whether the Sixth Amendment requires the appointment of counsel before indictment for indigent inmates confined in administrative detention while being investigated for criminal activities. 704 F. 2d, at 1119.[1] The Court of Appeals majority recognized that a plurality of this Court had concluded in *Kirby* v. *Illinois*, 406 U. S. 682 (1972), that the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing. The majority recognized that no such proceedings had been initiated against respondents during the period of time for which they asserted a right to appointed counsel in this case.

The majority went on to note, however, that *Kirby* is not a prison case and that the point at which the Sixth Amendment right to counsel is triggered is different in the prosecution of prison crimes. 704 F. 2d, at 1120. In so holding the majority analogized to Sixth Amendment speedy trial cases, where this Court has held that the Sixth Amendment speedy trial right is triggered when an individual is arrested and held to answer criminal charges. See *United States* v. *Marion*, 404 U. S. 307, 320 (1971). The en banc majority reasoned that just as such an arrest constitutes an "accusation" for Sixth Amendment speedy trial purposes, the administrative detention of an inmate for more than 90 days because of a pending felony investigation constitutes an "accusation" for Sixth Amendment right to counsel purposes.[2] Thus, according to the Court of Appeals' holding, an indigent inmate isolated in administrative detention while the subject of a felony investigation must be afforded counsel after 90 days, or else be released back into the prison population, in order to ensure that he or his lawyer will be able to take preindictment investigatory steps to preserve his defense at trial. 704 F. 2d, at 1124.

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[1] The narrow issue before the Court of Appeals and before us today is whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondents' situation. Respondents have not contended that they were denied the opportunity to retain their own private counsel while they were in administrative segregation. 704 F. 2d, at 1119. As the Court of Appeals noted, respondents had visitation privileges and the opportunity to make unmonitored phone calls to attorneys while in the ADU. *Ibid.* See 28 CFR §§541.19(c)(10), 541.20(d) (1983). Respondents also have not asserted a Sixth Amendment ineffective-assistance-of-counsel claim nor have they questioned our holding in *Wolff* v. *McDonnell*, 418 U. S. 539, 570 (1974), that inmates have no right to retained or appointed counsel at prison disciplinary proceedings. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 315 (1976).

Applying its test to the facts of this case, the Court of Appeals majority held that each respondent had been denied his Sixth Amendment right to counsel. It concluded that the record showed that each respondent had been held in administrative detention longer than 90 days, that each had been held at least in part because of a pending felony investigation,[3] and that each had requested and had been denied counsel during his confinement in the ADU. The majority went on to conclude that the appropriate remedy for redressing the Sixth Amendment violations in this case was reversal of respondents' convictions and dismissal of the indictments against them.[4]

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[2] The majority arrived at the 90-day figure based on its own interpretation of the current federal prison regulations as allowing detention for up to 90 days for disciplinary reasons. See 28 CFR § 541.20(c) (1983).

[3] Relying on his interpretation of current prison regulations, the Solicitor General vehemently argues that, whatever additional reasons legitimately may have contributed to the decision to confine respondents in the ADU, the primary reason for their confinement was to ensure the security of the institution. Thus he argues that that security-related detention cannot be equated with an arrest or accusation for Sixth Amendment purposes. Brief for United States 23–27; Tr. of Oral Arg. 9–12. But our holding today makes the reason for the detention irrelevant for purposes of the only issue before us, the point at which the Sixth Amendment right to counsel is triggered. Respondents have not challenged "the legitimacy of administrative detention in general or its appropriateness" in their particular cases. 704 F. 2d, at 1121.

Five judges dissented from the en banc majority's Sixth Amendment holding. Relying on *Kirby* v. *Illinois, supra,* the dissent concluded that the Sixth Amendment right to counsel is triggered by the initiation of formal criminal proceedings even in the prison context, and that the majority's conclusion to the contrary shows a misunderstanding of the purpose of the counsel guarantee. 704 F. 2d, at 1127–1129. We agree with the dissenting judges' application of our precedents to this situation, and, accordingly, we reverse the en banc majority's holding that respondents had a Sixth Amendment right to the appointment of counsel during their preindictment segregation.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." As the Court of Appeals majority noted, our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. In *Kirby* v. *Illinois, supra,* a plurality of the Court summarized our prior cases as follows:

> "In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama,* 287 U. S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama, supra; Johnson* v. *Zerbst,*

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[4] The Solicitor General argues here that dismissal of the indictments is an inappropriate remedy absent a showing of actual and specific prejudice to respondents and that they have not made that showing in this case. Brief for United States 44–60. Given our holding on the substantive Sixth Amendment issue, however, we have no occasion to address the remedy question.

> 304 U. S. 458; *Hamilton* v. *Alabama*, 368 U. S. 52; *Gideon* v. *Wainwright*, 372 U. S. 335; *White* v. *Maryland*, 373 U. S. 59; *Massiah* v. *United States*, 377 U. S. 201; *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Coleman* v. *Alabama*, 399 U. S. 1.
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> ". . . [W]hile members of the Court have differed as to the existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*, at 688–689 (emphasis in original).

The view that the right to counsel does not attach until the initiation of adversary judicial proceedings has been confirmed by this Court in cases subsequent to *Kirby*. See *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981); *Moore* v. *Illinois*, 434 U. S. 220, 226–227 (1977); *Brewer* v. *Williams*, 430 U. S. 387, 398–399 (1977); *United States* v. *Mandujano*, 425 U. S. 564, 581 (1976) (opinion of BURGER, C. J.).[5]

That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). Indeed the right to counsel

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[5] The only arguable deviations from that consistent line of cases are *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Although there may be some language to the contrary in *United States* v. *Wade*, 388 U. S. 218 (1967), we have made clear that we required counsel in *Miranda* and *Escobedo* in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980); *Kirby* v. *Illinois*, 406 U. S., at 689; *Johnson* v. *New Jersey*, 384 U. S. 719, 729–730 (1966).

> "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938).

Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, *United States* v. *Wade*, 388 U. S. 218 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," *United States* v. *Ash*, *supra*, at 310, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, *supra*, at 224.

Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings "is far from a mere formalism." *Kirby* v. *Illinois*, 406 U. S., at 689. It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Ibid.*

The Court of Appeals departed from our consistent interpretation of the Sixth Amendment in these cases, and in so doing, fundamentally misconceived the nature of the right to counsel guarantee. We agree with the dissent that the majority's analogy to Sixth Amendment speedy trial cases is inapt. Our speedy trial cases hold that that Sixth Amendment right may attach before an indictment and as early as the time of "arrest and holding to answer a criminal charge," *United States* v. *MacDonald*, 456 U. S. 1, 6–7 (1982); *United States* v. *Lovasco*, 431 U. S. 783, 788–789 (1977); *Dillingham* v. *United States*, 423 U. S. 64 (1975) *(per curiam); United States* v. *Marion*, 404 U. S., at 320, but we have never held that the right to counsel attaches at the time of arrest. This difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest, "to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States* v. *MacDonald*, *supra*, at 8. See *Barker* v. *Wingo*, 407 U. S. 514, 532–533 (1972); *United States* v. *Marion*, *supra*, at 320. Thus, the majority's attempt to draw an analogy between an arrest and an inmate's administrative detention pending investigation may have some relevance in analyzing when the speedy trial right attaches in this context, but it is not relevant to a proper determination of when the right to counsel attaches.[6]

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[6] Of course we express no view as to when the Sixth Amendment speedy trial right attaches in this context because that issue is not before us. The Court of Appeals for the Ninth Circuit, like several other Circuits, see, *e. g.*, *United States* v. *Daniels*, 698 F. 2d 221, 223 (CA4 1983); *United States* v. *Blevins*, 593 F. 2d 646, 647 (CA5 1979) *(per curiam)*, however, has held that the segregation of an inmate from the general population pending criminal charges does not constitute an "arrest" for purposes of the speedy trial right. *United States* v. *Clardy*, 540 F. 2d 439, 441, cert. denied, 429 U. S. 963 (1976). Given its own *Clardy* holding, the Court of Appeals' analogy here seems somewhat strained.

The Court of Appeals' holding also confuses the purpose of the right to counsel with purposes that are served by the Fifth Amendment due process guarantee and the statutes of limitations applicable to the particular crime being investigated. The majority concludes that the extension of the right to counsel to this prison context is necessary to protect against the possibility that the Government may delay the initiation of formal charges, thus delaying the appointment of counsel, while it develops its case against the isolated and unaided inmate. 704 F. 2d, at 1122. By the time the Government decides to bring charges, the majority felt, witnesses' memories could have dimmed, alibi witnesses could have been transferred to other facilities, and physical evidence could have deteriorated. *Id.*, at 1126.

Those concerns, while certainly legitimate ones, are simply not concerns implicating the right to counsel, and we reaffirm that the mere "possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *United States* v. *Marion*, *supra*, at 321–322. In holding that the appointment of counsel or the release of the inmate from segregation could remedy its concerns, the Court of Appeals must have concluded, quite illogically we believe, that the presence of the inmate in the general prison population or the appointment of a lawyer could somehow prevent the deterioration of physical evidence, or that the inmate or his counsel could begin an effective investigation of the crime within the restricted prison walls before even being able to discover the nature of the Government's case. Of course, both inside and outside the prison, it may well be true that in some cases preindictment investigation could help a defendant prepare a better defense. But, as we have noted, our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator, and we see no reason to adopt that novel interpretation of the right to counsel in this case.

Thus, at bottom, the majority's concern is that because an inmate suspected of a crime is already in prison, the prosecution may have little incentive promptly to bring formal charges against him, and that the resulting preindictment delay may be particularly prejudicial to the inmate, given the problems inherent in investigating prison crimes, such as the transient nature of the prison population and the general reluctance of inmates to cooperate. But applicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, *United States* v. *Lovasco*, *supra*, at 788–789; *United States* v. *Marion*, *supra*, at 322, and, beyond that protection, the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States* v. *Lovasco*, *supra*, at 789–790; *United States* v. *Marion*, *supra*, at 324.[7] Those protections apply to criminal defendants within and without the prison walls, and we decline to depart from our traditional interpretation of the Sixth Amendment right to counsel in order to provide additional protections for respondents here.

We conclude that the Court of Appeals was wrong in holding that respondents were constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them. Accordingly, we reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

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[7] We have of course rejected the arguments that prosecutors are constitutionally obligated to file charges against a suspect as soon as they have probable cause but before they believe that they can establish guilt beyond a reasonable doubt, *United States* v. *Lovasco*, 431 U. S., at 791, and that prosecutors must file charges as soon as they marshal enough evidence to prove guilt beyond a reasonable doubt but before their investigations are complete. *Id.*, at 792–795.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring in the judgment.

"Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means *at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) (emphasis supplied) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)). That statement, which does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings, has been the rule this Court has consistently followed. Today the Court seems to adopt a broader rule, stating that "the right to counsel attaches *only* at or after the initiation of adversary judicial proceedings against the defendant." *Ante*, at 187 (emphasis supplied). Because I believe this statement is unjustified by our prior cases and unnecessary to decide this case, I cannot join the opinion of the Court.

In *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), this Court squarely held that the Sixth Amendment's right to counsel can attach before formal charges have been filed. Escobedo had been denied access to his lawyer while he was in custody but before any formal charges had been filed. The Court explained:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a

> general investigation of 'an unsolved crime.' Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." *Id.*, at 485 (citation omitted) (quoting *Spano* v. *New York*, 360 U. S. 315, 327 (1959) (Stewart, J., concurring)).

The Court added: "It would exalt form over substance to make the right to counsel, under the circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." 378 U. S., at 486.[1]

The Court's dictum concerning the right to counsel is likewise inconsistent with *Miranda* v. *Arizona*, 384 U. S. 436 (1966). There, the Court held that during custodial interrogation the suspect has a right to have counsel present, and that if he cannot afford counsel he is entitled to have counsel appointed to represent him free of charge. See *id.*, at 469–473. The Court recognized that custodial interrogation was the true beginning of adversarial proceedings: "It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Id.*, at 477. See also *Coleman* v. *Alabama*, 399 U. S. 1, 20 (1970) (Harlan, J., concurring in part and dissenting in part); *Dickey* v. *Florida*, 398 U. S. 30, 44 (1970) (BRENNAN, J., concurring); *United States* v. *Oliver*, 505 F. 2d 301, 305, n. 12 (CA7 1974).[2]

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[1] See also 378 U. S., at 487, n. 6 ("The English Judges' Rules also recognize that a functional rather than a formal test must be applied and that, under circumstances such as those here, no special significance should be attached to formal indictment"). Indeed, the rule the majority seems to embrace is similar to the rule advocated in dissent in *Escobedo*. See *id.*, at 493–494 (Stewart, J., dissenting).

[2] To say, as did the Court in *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), that the "prime purpose" of *Escobedo* and *Miranda* was "to guarantee full effectuation of the privilege against self-incrimination," 384 U. S.,

United States v. *Wade*, 388 U. S. 218 (1967), illustrates how Sixth Amendment jurisprudence has turned not on the formal initiation of judicial proceedings but rather on the nature of the confrontation between the authorities and the citizen. The Court began its Sixth Amendment analysis concerning the right to counsel at lineup identifications by noting that "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.*, at 226. The Court then reviewed its prior cases and concluded:

> "[W]e scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.*, at 227 (emphasis in original).

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at 729, is merely to state a central rationale for attachment of the right to counsel prior to the formal commencement of the adversary process; it in no way contradicts the proposition that the Sixth Amendment can apply prior to the initiation of judicial proceedings. *Escobedo* elaborates:

"It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor the right of the accused to be advised by his lawyer of his privilege against self-incrimination." 378 U. S., at 488 (footnotes and citations omitted).

The Court has adhered to this formulation in subsequent cases. See *United States* v. *Henry*, 447 U. S. 264, 269 (1980); *Gerstein* v. *Pugh*, 420 U. S. 103, 122–123 (1975); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 238–240 (1973); *Coleman* v. *Alabama*, 399 U. S., at 9 (plurality opinion). Perhaps most telling is *United States* v. *Ash*, 413 U. S. 300 (1973), dealing with the right to counsel at a pretrial photographic identification of the accused as the perpetrator by a Government witness. While Justice Stewart argued that "this constitutional 'right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated,'" *id.*, at 322 (opinion concurring in judgment) (quoting *Kirby* v. *Illinois*, 406 U. S., at 688 (plurality opinion)), that was not the path the Court took. It acknowledged that "extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered part of the trial itself," 413 U. S., at 310. It concluded that "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.*, at 313.[3]

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[3] Contrary to the majority's intimations, the cases it cites *ante*, at 187–188, do not indicate that a majority of the Court has embraced the broad rule suggested by the majority's dictum. The statement in *Kirby* v. *Illinois*, 406 U. S. 682 (1972), that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated," *id.*, at 688 (plurality opinion), was not joined by a majority. Similarly, THE CHIEF JUSTICE's opinion in *United States* v. *Mandujano*, 425 U. S. 564, 581 (1976) (plurality opinion), was not joined by a majority of the Court. *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981), and *Moore* v. *Illinois*, 434 U. S. 220, 226–227 (1977), merely describe what the *Kirby* plurality had required for the Sixth Amendment to attach, and held that the plurality's test was satisfied. In neither case did the Court have occasion to consider whether the right to counsel could ever attach prior to the point identified by the *Kirby* plurality. As the quotation *supra*, at 193, demonstrates, *Brewer* v. *Williams*, 430 U. S. 387 (1977), left this issue open.

If the authorities take a person into custody in order to interrogate him or to otherwise facilitate the process of making a case against him, then under the rationale of *Escobedo*, *Miranda*, and our other cases, the person is sufficiently "accused" to be entitled to the protections of the Sixth Amendment. In these circumstances, subjecting the uncounseled suspect to questioning or other prosecutorial techniques may present "the high probability of substantial harm identified as controlling in *Wade*," *Gerstein*, 420 U. S., at 123. Thus, when a person is deprived of liberty in order to aid the prosecution in its attempt to convict him, and when the deprivation is likely to have the intended effect, that person is, in my judgment, "an accused."

I join the Court's judgment because I agree that respondents' detention in the Administrative Detention Unit (ADU) did not serve an accusatorial function. Under relevant regulations, respondents could be kept in the ADU simply because of the security risk they posed.[4] After hearings, prison administrators had concluded that respondents likely had murdered fellow inmates. Under such circumstances there can be no doubt that concern for the welfare of other inmates or respondents themselves fully justified administrative detention entirely apart from its relation to an ongoing criminal investigation. See *Hewitt* v. *Helms*, 459 U. S. 460, 473–476 (1983). Indeed, there is no finding in either of these consolidated cases that respondents were placed in the ADU at the behest of prosecutorial authorities or in order to aid prosecutorial efforts, nor is there a finding that their detention facilitated the investigation of the two murders at issue.[5] On this record there is no reason to believe that the segregation of suspected murderers from the general prison population either was intended to or had the effect of facilitating a criminal investigation rather than simply serving legitimate institutional policies.

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[4] The relevant regulation indicates that respondents could be placed in the ADU while a criminal investigation is pending because they pose a threat to themselves or others:

"The Warden may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, or other inmates or to the security or orderly running of the institution and when the inmate:

"(1) Is pending a hearing for a violation of Bureau regulations;

"(2) Is pending an investigation of a violation of Bureau regulations;

"(3) Is pending investigation or trial for a criminal act . . . ." 28 CFR § 541.22(a) (1983).

The Court of Appeals construed the Bureau of Prisons' regulations to permit detention for disciplinary purposes for no more than 90 days. See 704 F. 2d 1116, 1124–1125 (CA9 1983) (en banc). Assuming that construction is correct, the fact that respondents' detention after that point was not disciplinary does not mean it was therefore accusatory. To the contrary, the applicable regulation states: "Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection . . . , or where there are exceptional circumstances, ordinarily tied to *security* or complex investigative concerns." 28 CFR § 541.22(c)(1)

Accordingly, while I find no Sixth Amendment violation in this case, to the extent that the Court purports to formulate a

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(1983) (emphasis supplied). Thus, the regulation permits continued detention for security reasons alone. Finally, even if respondents' detention was in violation of the regulations, that does not establish that the detention, even if improper, had the purpose or effect of facilitating the criminal investigation.

[5] JUSTICE MARSHALL disagrees with this view of the record, relying on the District Court's statement that respondents Mills and Pierce's confinement to the ADU "was neither a form of prison discipline nor an attempt to ensure prison security," see *post*, at 200 (dissenting opinion). However, the District Court did not denominate this statement as a "finding of fact," but rather as a "conclusion of law." App. to Pet. for Cert. 47a–48a. The only factual predicate to this conclusion, indeed the only fact the District Court found with respect to the purpose and effect of respondents' segregation, was that the Bureau of Prisons' usual policies "would have required the [respondent]s' release back into the general prison population or their transfer to a more secure facility within the first few months after their ADU commitment," *id.*, at 43a. For the reasons stated in n. 4, *supra*, this finding is insufficient as a matter of law to support the Court of Appeals' judgment.

rule broader than necessary to decide the case before it, I cannot join its opinion.

JUSTICE MARSHALL, dissenting.

The majority misreads the development of Sixth Amendment doctrine when it states that "our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *Ante*, at 187. As JUSTICE STEVENS demonstrates, *ante*, at 193–197, we have recognized that in certain situations an individual's right to counsel is triggered *before* the formal initiation of adversary judicial proceedings. See, *e. g.*, *Escobedo* v. *Illinois*, 378 U. S. 478, 485–492 (1964). This recognition has stemmed from an appreciation that the government can transform an individual into an "accused" without officially designating him as such through the ritual of arraignment. Moreover, I agree with JUSTICE STEVENS that the government treats an individual as an accused when that individual "is deprived of liberty in order to aid the prosecution in its attempt to convict him, and when the deprivation is likely to have the intended effect . . . ." *Ante*, at 197.

Unlike JUSTICE STEVENS, however, I reject the judgment as well as the reasoning of the Court. JUSTICE STEVENS concurs in the judgment of the Court because, in his view, the transfer of respondents from the general prison population to the far harsher constraints of administrative detention[1] did not in any way serve "an accusatorial function" but served instead to further the security interests of the correctional institution and the welfare of respondents themselves. *Ibid.* My reading of the record and of the factfinding of the courts below leads me to a different conclusion. With respect to respondents Mills and Pierce, the District Court stated, in the portion of its opinion entitled "Factual Background," that by the time they were committed to administrative detention, "the finger of suspicion" had already been pointed at them. App. to Pet. for Cert. 45a–46a. This finding is corroborated by prison officials' own notation that respondents were to be detained in administrative detention "pending investigation or trial for a criminal act," App. 138–139, and by the odd course of events that transpired after respondents' detention: the Government's delay in seeking indictments alongside the unusually long period during which respondents were confined to their cells. See App. to Pet. for Cert. 42a–47a. The District Court was therefore justified in concluding that respondents' "commitment to [administrative detention] was neither a form of prison discipline nor an attempt to ensure prison security," but was instead "part and parcel of a sequence of prosecutive acts integrally related to the application of criminal sanctions." *Id.*, at 47a–48a. The District Court's findings and conclusion were noted and affirmed by the Court of Appeals. 704 F. 2d 1116, 1125 (1983). This Court has repeatedly stated that it "'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" See *Berenyi* v. *District Director, INS*, 385 U. S. 630, 635 (1967), quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). In this case no such showing of error has been made.

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[1] Subjection to administrative detention meant that respondents were confined in individual cells except for short daily exercise periods, that their participation in various prison programs was curtailed, and that they were denied access to the general prison population. See 704 F. 2d 1116, 1118 (1983).

We do not have the benefit of a trial judge's explicit factual findings with respect to respondents Reynoso, Segura, Ramirez, and Gouveia. However, we do have the Government's admission that one reason all of the respondents were kept in administrative detention was "because of the pendency of the criminal investigation . . . ." Brief for United States 26. This admission further supports the Court of Appeals' conclusion that "each [respondent] was held in [administrative detention] at least in part as a result of pending criminal charges." 704 F. 2d, at 1125.

Because of their disposition of the Sixth Amendment issue, neither the majority nor JUSTICE STEVENS reaches the other issue posed by this case: whether the Court of Appeals erred by dismissing the indictments against respondents. The Government claims that dismissing the indictments was inconsistent with this Court's decision in *United States* v. *Morrison*, 449 U. S. 361 (1981). In *Morrison*, we reversed the dismissal of an indictment in a case in which it was assumed, *arguendo*, that a Sixth Amendment violation had occurred and in which the defendant "demonstrated no prejudice of any kind . . . to the ability of her counsel to provide adequate representation . . . ." *Id.*, at 366. We stated that, in right-to-counsel cases, dismissal of an indictment is inappropriate "absent demonstrable prejudice, or substantial threat thereof," *id.*, at 365, because a presumption of prejudice would contravene "the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." *Id.*, at 364.

The Court of Appeals concluded that dismissal of respondents' indictments was warranted under both the *Morrison* standard and a presumption-of-prejudice standard that it found to be appropriate to the facts of this case. The Court of Appeals felt compelled to articulate an alternative to the *Morrison* standard because, in its view, this case was "fundamentally different" insofar as the right-to-counsel violation affected inmate-suspects held in administrative detention. 704 F. 2d, at 1126. The Court of Appeals concluded that in such a setting a presumption of prejudice would be appropriate "because ordinarily it will be impossible adequately either to prove or refute its existence." *Ibid.* I disagree with the Court of Appeals; its own application of *Morrison* to the facts of this case demonstrates that even in the context of a Sixth Amendment violation affecting prisoners, the usual process of case-specific inquiry will be adequate to determine whether dismissal of an indictment is warranted. The Court of Appeals concluded that even without an assumption of prejudice "there is evidence that 'substantial prejudice' may have occurred" in this case. 704 F. 2d, at 1126. This conclusion satisfies the *Morrison* requirement that persons seeking dismissal of their indictments must show either "demonstrable prejudice, *or substantial threat thereof* . . . ." 449 U. S., at 365 (emphasis added). Moreover, it is a conclusion amply supported by the record.[2]

Because I agree with the result reached by the Court of Appeals, though not with all of its reasoning, I respectfully dissent.

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[2] The conclusion that respondents Mills and Pierce were prejudiced is especially reliable due to the District Court's specific finding that "[b]ecause the passage of time has resulted in the irrevocable loss of exculpatory testimony and evidence, the government's failure to take steps to preserve the defendants' right to prepare a defense cannot be remedied other than by dismissing the indictment [with prejudice]." App. to Pet. for Cert. 50a.

ARIZONA v. RUMSEY

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 83-226. Argued April 23, 1984—Decided May 29, 1984

Arizona's statutory capital sentencing scheme provides that, after a murder conviction, the trial judge, with no jury, must conduct a separate sentencing hearing to determine whether death is the appropriate sentence. The judge must choose between two options: death or life imprisonment without possibility of parole for 25 years. The death sentence may not be imposed unless at least one statutory aggravating circumstance is present, but must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The judge must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument, the State having the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. After a jury convicted respondent of armed robbery and first-degree murder, the trial judge conducted the required sentencing hearing and ultimately found that no aggravating or mitigating circumstances were present. He ruled, contrary to the State's contention, that the statutory aggravating circumstance relating to killing for pecuniary gain applied only to murders for hire and did not apply to all murders committed in order to obtain money, such as murders committed during a robbery. Accordingly, respondent was sentenced on his murder conviction to life imprisonment without possibility of parole for 25 years, but he was also sentenced to 21 years' imprisonment for armed robbery, with the sentences to run consecutively. Respondent appealed to the Arizona Supreme Court, challenging the imposition of the consecutive sentences, and the State filed a cross-appeal, contending that the trial court had committed an error of law in interpreting the "pecuniary gain" aggravating circumstance to apply only to contract killings. Rejecting respondent's challenge to his sentence and ruling for the State on its cross-appeal, the court set aside the life sentence and remanded for redetermination of aggravating and mitigating circumstances and for resentencing on the murder conviction. On remand, the trial court held a new sentencing hearing; rejected respondent's argument that imposing the death penalty would violate *Bullington* v. *Missouri*, 451 U. S. 430; found that the "pecuniary gain" aggravating circumstance was present and that there was no mitigating circumstance sufficient to call for leniency; and sentenced respondent to death. On respondent's mandatory appeal, the Arizona Supreme Court held that under *Bullington*, respondent's death sentence violated the Double Jeopardy Clause of the Fifth Amendment and ordered that the sentence be reduced to life imprisonment without possibility of parole for 25 years.

Held: The Double Jeopardy Clause prohibits Arizona from sentencing respondent to death. This case is controlled by *Bullington*, which held that the Double Jeopardy Clause applied to Missouri's capital sentencing proceeding—barring imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, had resulted in rejection of the death sentence—because that proceeding was comparable to a trial on the issue of guilt and the initial sentence of life imprisonment in effect acquitted the defendant of the death penalty. The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that made it resemble a trial for purposes of the Double Jeopardy Clause. Thus, respondent's initial life sentence constitutes an acquittal of the death penalty, and the State cannot now sentence respondent to death on his conviction for first-degree murder. Although the trial court initially relied on a misconstruction of the statute defining the "pecuniary gain" aggravating circumstance, reliance on an error of law does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits of the issue in the sentencing proceeding—whether death was the appropriate punishment for respondent's offense. *United States* v. *Wilson*, 420 U. S. 332, distinguished. Pp. 209–212.

136 Ariz. 166, 665 P. 2d 48, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 213.

William J. Schafer III argued the cause for petitioner. With him on the brief was *Robert K. Corbin*, Attorney General of Arizona.

James R. Rummage, by appointment of the Court, 465 U. S. 1019, argued the cause and filed a brief for respondent.*

**Timothy K. Ford, Jack Greenberg, James M. Nabrit III*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the Double Jeopardy Clause prohibits the State of Arizona from sentencing respondent to death after the life sentence he had initially received was set aside on appeal. We agree with the Supreme Court of Arizona that *Bullington* v. *Missouri*, 451 U. S. 430 (1981), squarely controls the disposition of this case. Under the interpretation of the Double Jeopardy Clause adopted in that decision, imposition of the death penalty on respondent would be unconstitutional.

I

An Arizona jury convicted respondent of armed robbery and first degree murder. The trial judge, with no jury, then conducted a separate sentencing hearing to determine, according to the statutory scheme for considering aggravating and mitigating circumstances, Ariz. Rev. Stat. Ann. § 13–703 (Supp. 1983–1984), whether death was the appropriate sentence for the murder conviction. Petitioner, relying entirely on the evidence presented at trial, argued that three statutory aggravating circumstances were present. Respondent, presenting only one witness, countered that no aggravating circumstances were present but that several mitigating circumstances were. One of the principal points of contention concerned the scope of Ariz. Rev. Stat. Ann. § 13–703(F)(5) (Supp. 1983–1984), which defines as an aggravating circumstance the murder's commission "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Respondent argued that this provision applies only to murders for hire, whereas petitioner argued that it applies to all murders committed in order to obtain money.

Several days after the sentencing hearing, the trial judge, who imposes sentence without the assistance of a jury under the Arizona scheme, returned a "special verdict" setting forth his findings on each of the statutory aggravating and mitigating circumstances. The judge found that no aggravating or mitigating circumstances were present. App. 53–58. In particular, with respect to the aggravating circumstance defined in § 13–703(F)(5), the trial judge found:

> "5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> "In this regard, the Court does not agree with the State's interpretation of A. R. S. 13–703(F)(5) and *State* v. *Madsen* filed March 26, 1980. The Court believes that when A. R. S. 13–703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc." App. 54–55.

Having found no aggravating circumstances, the trial court was statutorily barred from sentencing respondent to death. Ariz. Rev. Stat. Ann. § 13–703(E) (Supp. 1983–1984); App. to Pet. for Cert. A–3. The court accordingly sentenced respondent to life imprisonment without possibility of parole for 25 years, the sentence statutorily mandated for first degree murder when the death penalty is not imposed. Ariz. Rev. Stat. Ann. § 13–703(A) (Supp. 1983–1984). With respect to the armed robbery conviction, the court found that respondent had committed a "dangerous offense" involving use of a deadly weapon and that there was an aggravating circumstance not outweighed by any mitigating circumstance—respondent had "planned this robbery . . . in order to obtain what [he] knew was only a few hundred dollars . . . ." App. 66. As authorized by Arizona law, Ariz. Rev. Stat. Ann. §§ 13–604 and 13–702 (1978 and Supp. 1983–1984), the court accordingly sentenced respondent to 21 years' imprisonment for armed robbery. The prison terms for the two convictions were to run consecutively.

Respondent appealed the judgment to the Supreme Court of Arizona, arguing that imposition of consecutive sentences in his case violated both federal and state law. Under Arizona law, Ariz. Rev. Stat. Ann. § 13–4032(4) (1978), respondent's appeal permitted petitioner to file a cross-appeal from the life sentence; in that cross-appeal petitioner contended that the trial court had committed an error of law in interpreting the pecuniary gain aggravating circumstance to apply only to contract killings. The State Supreme Court rejected respondent's challenge to his sentence. It agreed with petitioner, however, that the trial court had misinterpreted § 13–703(F)(5): "theft committed in the course of a murder" could constitute an aggravating circumstance under that section. 130 Ariz. 427, 431, 636 P. 2d 1209, 1213 (1981). Because of the trial court's misinterpretation, the State Supreme Court concluded, "the sentence of life imprisonment previously imposed will have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing." *Id.*, at 432, 636 P. 2d, at 1214. The sentence for armed robbery was left undisturbed.

On remand the trial court held a new sentencing hearing. Neither petitioner nor respondent presented any new evidence, although they had the opportunity to do so. The court heard argument, however, both on the lawfulness of imposing the death penalty on resentencing and on the presence of aggravating and mitigating circumstances.

Petitioner argued that neither federal nor state law barred sentencing respondent to death. Petitioner also urged the court to find the three statutory aggravating circumstances identified at the first sentencing, largely repeating the arguments it had made at the first proceeding. App. 78–94. Respondent argued that imposing the death penalty would violate *Bullington* v. *Missouri*, 451 U. S. 430 (1981), *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and Arizona Rule of Criminal Procedure 26.14, which implements the resentencing principles of the *Pearce* case. With respect to aggravating and mitigating circumstances, respondent effectively conceded the presence of the pecuniary gain aggravating circumstance, thinking the issue foreclosed by a statement in the opinion of the State Supreme Court. See App. 104; 130 Ariz., at 431, 636 P. 2d, at 1213 ("In the instant case, the hope of financial gain was a cause of the murder . . ."). But respondent contended that this aggravating circumstance was outweighed by a statutory mitigating circumstance not among the five enumerated in the death sentencing statute: according to the testimony of the jury foreperson, the conviction for first degree murder was based on the felony-murder instruction, not on the premeditation instruction; thus, respondent contended, to regard the theft as an aggravating circumstance after using it to elevate second degree murder into first would be a form of double counting. App. 94–108.

Several days after the hearing, the trial court returned a special verdict reciting findings on each of the statutory aggravating and mitigating circumstances and on the one nonstatutory mitigating circumstance urged by respondent. The court found to be present only one of the seven statutory aggravating circumstances, namely, § 13–703(F)(5), concerning commission of the murder for pecuniary gain. The court also found that none of the five statutory mitigating circumstances was present and that the fact that the murder conviction was for felony murder, if a mitigating circumstance at all, was not sufficiently substantial to call for leniency. App. 118–124. Accordingly, as required under Arizona law, Ariz. Rev. Stat. Ann. § 13–703(E) (Supp. 1983–1984), the court sentenced respondent to death.

In his mandatory appeal to the Supreme Court of Arizona, respondent argued that imposition of the death sentence on resentencing, after he had effectively been "acquitted" of death at his initial sentencing, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784 (1969). He also argued that the death sentence violated the Due Process Clause of the Fourteenth Amendment, as interpreted in *North Carolina* v. *Pearce*, *supra*. The Supreme Court of Arizona addressed only the first argument. It concluded that, under this Court's decision in *Bullington* v. *Missouri*, *supra*, respondent's sentence violated the constitutional prohibition on double jeopardy. 136 Ariz. 166, 665 P. 2d 48 (1983). The court therefore ordered respondent's sentence for first degree murder reduced to life imprisonment without possibility of parole for 25 years.

The State of Arizona filed a petition for a writ of certiorari. We granted certiorari, 464 U. S. 1038 (1983), and now affirm.

II

In *Bullington* v. *Missouri* this Court held that the Double Jeopardy Clause applies to Missouri's capital sentencing proceeding and thus bars imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, has resulted in rejection of the death sentence. The Court identified several characteristics of Missouri's sentencing proceeding that make it comparable to a trial for double jeopardy purposes. The discretion of the sentencer—the jury in Missouri—is restricted to precisely two options: death, and life imprisonment without possibility of release for 50 years. In addition, the sentencer is to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial. Finally, the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. 451 U. S., at 438. For these reasons, when the Missouri sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case. Because the Court believed that the anxiety and ordeal suffered by a defendant in Missouri's capital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, the Court concluded that the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.

The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. See Ariz. Rev. Stat. Ann. § 13–703 (Supp. 1983–1984); 136 Ariz., at 171–172, 665 P. 2d, at 53–54. As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri. *Id.*, at 171–174, 665 P. 2d, at 53–56.

That the sentencer in Arizona is the trial judge rather than the jury does not render the sentencing proceeding any less like a trial. See *United States* v. *Morrison*, 429 U. S. 1, 3 (1976) (Double Jeopardy Clause treats bench and jury trials alike). Nor does the availability of appellate review, including reweighing of aggravating and mitigating circumstances, make the appellate process part of a single continuing sentencing proceeding. The Supreme Court of Arizona noted that its role is strictly that of an appellate court, not a trial court. Indeed, no appeal need be taken if life imprisonment is imposed, and the appellate reweighing can work only to the defendant's advantage. 136 Ariz., at 173–174, 665 P. 2d, at 55–56. In short, a sentence imposed after a completed Arizona capital sentencing hearing is a judgment like the sentence at issue in *Bullington* v. *Missouri*, which this Court held triggers the protections of the Double Jeopardy Clause.

The double jeopardy principle relevant to respondent's case is the same as that invoked in *Bullington:* an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the *Bullington* principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination, but it does not alter its essential character." *United States* v. *Scott,* 437 U. S. 82, 98 (1978) (quoting *id.,* at 106 (BRENNAN, J., dissenting)). Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error.

United States v. *Wilson,* 420 U. S. 332 (1975), held that the prosecution could appeal from a judgment of acquittal entered by the trial judge after the jury had returned a verdict of guilty. But that holding has no application to this case. No double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy. By contrast, in respondent's initial capital sentencing, there was only one decisionmaker and only one set of findings of fact, all favorable to respondent. The trial court "acquitted" respondent of the death penalty, and there was no verdict of "guilty" for the appellate court to reinstate. The Supreme Court of Arizona accordingly "remanded for redetermination of aggravating and mitigating circumstances and resentencing," 130 Ariz., at 432, 636 P. 2d, at 1214—that is, for a second sentencing proceeding similar to the first. Whereas the defendant in *Wilson* was not to be subjected to a second trial after an acquittal at his first, that is precisely what has happened to respondent.

III

Bullington v. *Missouri* held that double jeopardy protections attach to Missouri's capital sentencing proceeding because that proceeding is like a trial. The capital sentencing proceeding in Arizona is indistinguishable for double jeopardy purposes from the proceeding in Missouri. Under *Bullington*, therefore, respondent's initial sentence of life imprisonment constitutes an acquittal of the death penalty, and the State of Arizona cannot now sentence respondent to death on his conviction for first degree murder.

Petitioner has invited the Court to overrule *Bullington*, decided only three years ago. We decline the invitation. Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification. See, *e. g.*, *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944). Petitioner has suggested no reason sufficient to warrant our taking the exceptional action of overruling *Bullington*.

The judgment of the Supreme Court of Arizona is therefore

Affirmed.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

Today the Court affirms the decision of the Arizona Supreme Court vacating the death sentence imposed on respondent for a murder committed in the course of an armed robbery. Applying the interpretation given the Double Jeopardy Clause by a bare majority of this Court in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), the Court concludes that in this case the first sentencing also amounted to an implied acquittal of respondent's eligibility for the death penalty. I continue to believe that *Bullington* was wrongly decided for the reasons expressed in JUSTICE POWELL's dissent in that case. But even apart from those views, I do not believe that the reasoning underlying *Bullington* applies to this remand for resentencing to correct a legal error. Accordingly, I dissent.

The central premise of the Court's holding today is that the trial court's first finding—that there were no aggravating and no mitigating circumstances and therefore only a life sentence could be imposed—amounted to an "implied acquittal" on the merits of respondent's eligibility for the death sentence, thereby barring the possibility of an enhanced sentence upon resentencing by virtue of the Double Jeopardy Clause. But the Court's continued reliance on the "implied acquittal" rationale of *Bullington* is simply inapt. Unlike the jury's decision in *Bullington*, where the jury had broad discretion to decide whether capital punishment was appropriate, the trial judge's discretion in this case was carefully confined and directed to determining whether certain specified aggravating factors existed. Compare Mo. Rev. Stat. § 565.008 (1979) with Ariz. Rev. Stat. Ann. § 13-703(E)

(Supp. 1983–1984). It is obvious from the record that the State established at the first hearing that respondent murdered his victim in the course of an armed robbery, a fact which was undisputed at sentencing. In no sense can it be meaningfully argued that the State failed to "prove" its case—the existence of at least one aggravating circumstance. It is hard to see how there has been an "implied acquittal" of a statutory aggravating circumstance when the record explicitly establishes the factual basis that such an aggravating circumstance existed. But for the trial judge's erroneous construction of governing state law, the judge would have been required to impose the death penalty.

If, as a matter of state law, the Arizona Supreme Court had simply corrected the erroneous sentence itself without remanding, there could be no argument that *Bullington* would prevent the imposition of the death sentence. That much was made clear in our decision in *United States* v. *Wilson*, 420 U. S. 332 (1975). After stating the well-settled rule that an appellate court's order reversing a conviction is subject to further review without subjecting a defendant to double jeopardy, we wrote:

> "It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling. Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.*, at 345.

The fact that in this case the legal error was ultimately corrected by the trial court did not mean that the State sought to marshal the same or additional evidence against a capital defendant which had proved insufficient to prove the State's "case" against him the first time. There is no logical reason for a different result here simply because the Arizona Supreme Court remanded the case to the trial court for the purpose of correcting the legal error, particularly when the resentencing did not constitute the kind of "retrial" which the *Bullington* Court condemned. Accordingly, I would reverse the decision of the Arizona Supreme Court in this case.

BERNAL *v.* FAINTER, SECRETARY OF STATE OF TEXAS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-630. Argued March 28, 1984—Decided May 30, 1984

Petitioner, a resident alien, applied to the Texas Secretary of State to become a notary public, who under Texas law authenticates written instruments, administers oaths, and takes out-of-court depositions. Petitioner's application was denied because he failed to satisfy the requirement of a Texas statute (Article 5949(2)) that a notary public be a United States citizen. After an unsuccessful administrative appeal, petitioner (and another individual) brought suit in Federal District Court, claiming that Article 5949(2) violated the Federal Constitution. The District Court ruled in petitioner's favor, concluding that the citizenship requirement, reviewed under a strict-scrutiny standard, violated the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals reversed, holding that the proper standard for review was the rational-relationship test and that Article 5949(2) satisfied that test.

Held: Article 5949(2) violates the Equal Protection Clause. Pp. 219–228.

(a) As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available. The "political function" exception to the strict-scrutiny rule applies to laws that exclude aliens from positions intimately related to the process of democratic self-government. Under this exception, the standard of review is lowered when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations go to the heart of representative government. *Sugarman* v. *Dougall,* 413 U. S. 634; *Cabell* v. *Chavez-Salido,* 454 U. S. 432. Pp. 219–222.

(b) The "political function" exception is inapplicable to Article 5949(2). Notaries public do not fall within the category of officials who perform functions that go to the heart of representative government merely because they are designated as public officers by the Texas Constitution. The dispositive factor is the actual *function* of a position, not its *source.* The focus of the inquiry is whether the position is such that the officeholder will necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population. Although there is a critical need for a notary's duties to be carried out correctly and with integrity, those duties are essentially clerical and ministerial. Texas notaries are not invested with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Cf. *In re Griffiths*, 413 U. S. 717. Pp. 222–227.

(c) Article 5949(2) does not meet the applicable strict-scrutiny standard of judicial review. To satisfy such standard, the State must show that the statute furthers a compelling state interest by the least restrictive means practically available. With regard to the State's asserted interest in ensuring that notaries are familiar with Texas law, there is nothing in the record indicating that resident aliens, as a class, are so incapable of familiarizing themselves with Texas law as to justify the State's absolute and classwide exclusion. Furthermore, if the State's concern were truly "compelling," one would expect the State to give some sort of test actually measuring a person's familiarity with the law. The State, however, administers no such test. Similarly inadequate is the State's purported interest in ensuring the availability of notaries' testimony years after their acts. The State failed to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative, problem to the State. Pp. 227–228.

710 F. 2d 190, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 228.

Cornish F. Hitchcock argued the cause for petitioner. With him on the brief were *Alan B. Morrison*, *John Cary Sims*, *Thomas Sullivan*, and *Denis A. Downey*.

Mary F. Keller, Assistant Attorney General of Texas, argued the cause for respondents. With her on the brief were *Jim Mattox*, Attorney General, *Fernando Gomez*, Assistant Attorney General, and *David R. Richards*.

JUSTICE MARSHALL delivered the opinion of the Court.

The question posed by this case is whether a statute of the State of Texas violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by denying aliens the opportunity to become notaries public. The Court of Appeals for the Fifth Circuit held that the statute does not offend the Equal Protection Clause. We granted certiorari, 464 U. S. 1007 (1983), and now reverse.

I

Petitioner, a native of Mexico, is a resident alien who has lived in the United States since 1961. He works as a paralegal for Texas Rural Legal Aid, Inc., helping migrant farmworkers on employment and civil rights matters. In order to administer oaths to these workers and to notarize their statements for use in civil litigation, petitioner applied in 1978 to become a notary public.[1] Under Texas law, notaries public authenticate written instruments, administer oaths, and take out-of-court depositions.[2] The Texas Secretary of State denied petitioner's application because he failed to satisfy the statutory requirement that a notary public be a citizen of the United States. Tex. Rev. Civ. Stat. Ann., Art. 5949(2) (Vernon Supp. 1984) (hereafter Article 5949(2)). After an unsuccessful administrative appeal, petitioner brought suit in the Federal District Court, claiming that the citizenship requirement mandated by Article 5942(2) violated the Federal Constitution.[3]

The District Court ruled in favor of petitioner. *Vargas* v. *Strake*, C. A. No. B-79-147 (SD Tex., Oct. 9, 1981) (mem.). It reviewed the State's citizenship requirement under a strict-scrutiny standard and concluded that the requirement violated the Equal Protection Clause. The District Court also suggested that even under a rational-relationship standard, the state statute would fail to pass constitutional muster because its citizenship requirement "is wholly unrelated to the achievement of any valid state interest." App. to Pet. for Cert. 11a. A divided panel of the Court of Appeals for the Fifth Circuit reversed, concluding that the proper standard for review was the rational-relationship test and that Article 5949(2) satisfied that test because it "bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state." *Vargas* v. *Strake*, 710 F. 2d 190, 195 (1983).[4]

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[1] Prior to his employment in Texas, petitioner worked in a legal services program in Indiana and held a commission as a notary in that State. *Vargas* v. *Strake*, 710 F. 2d 190, 191 (CA5 1983).

[2] "Notaries Public shall have the same authority to take acknowledgments or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks . . . ." Tex. Rev. Civ. Stat. Ann., Art. 5954 (Vernon Supp. 1984); see also R. Rothman, Notary Public: Practices & Glossary (1978).

[3] This suit was initially brought by Margarita M. Vargas whom petitioner joined as a coplaintiff. Vargas is no longer a party to this suit because subsequent to filing her complaint she obtained United States citizenship. *Vargas* v. *Strake*, *supra*, at 192.

II

As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.[5] In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.[6] Applying this principle, we have invalidated an array of state statutes that denied aliens the right to pursue various occupations. In *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), we struck down a state statute barring aliens from employment in permanent positions in the competitive class of the state civil service. In *In re Griffiths*, 413 U. S. 717 (1973), we nullified a state law excluding aliens from eligibility for membership in the State Bar. And in *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976), we voided a state law that excluded aliens from the practice of civil engineering.

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[4] The holding of the Court of Appeals conflicts with the holding of every other state and federal court decision that has considered the constitutionality of statutes barring aliens from eligibility to become notaries public. See, *e. g.*, *Jii* v. *Rhodes*, 577 F. Supp. 1128 (SD Ohio 1983) (invalidating Ohio statute); *Cheng* v. *Illinois*, 438 F. Supp. 917 (ND Ill. 1977) (invalidating Illinois statute); *Taggart* v. *Mandel*, 391 F. Supp. 733 (Md. 1975) (invalidating Maryland statute) (three-judge court); *Graham* v. *Ramani*, 383 So. 2d 634 (Fla. 1980) (invalidating Florida statute).

[5] "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971) (footnotes and citations omitted).

[6] Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is "strict" in theory but usually "fatal" in fact. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

We have, however, developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labeled the "political function" exception and applies to laws that exclude aliens from positions intimately related to the process of democratic self-government. The contours of the "political function" exception are outlined by our prior decisions. In *Foley* v. *Connelie*, 435 U. S. 291 (1978), we held that a State may require police to be citizens because, in performing a fundamental obligation of government, police "are clothed with authority to exercise an almost infinite variety of discretionary powers" often involving the most sensitive areas of daily life. *Id.*, at 297. In *Ambach* v. *Norwick*, 441 U. S. 68 (1979), we held that a State may bar aliens who have not declared their intent to become citizens from teaching in the public schools because teachers, like police, possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation. They have direct, day-to-day contact with students, exercise unsupervised discretion over them, act as role models, and influence their students about the government and the political process. *Id.*, at 78–79. Finally, in *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982), we held that a State may bar aliens from positions as probation officers because they, like police and teachers, routinely exercise discretionary power, involving a basic governmental function, that places them in a position of direct authority over other individuals.

The rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

> "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community." *Id.*, at 439–440.

We have therefore lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations "go to the heart of representative government." *Sugarman* v. *Dougall*, *supra*, at 647. "While not retreating from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny . . . we have concluded that strict scrutiny is out of place when the restriction primarily serves a political function. . . ." *Cabell* v. *Chavez-Salido*, *supra*, at 439 (citation omitted).

To determine whether a restriction based on alienage fits within the narrow political-function exception, we devised in *Cabell* a two-part test.

> "First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently

tailored, it may be applied in the particular case only to 'persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, execution, or review of broad public policy' and hence 'perform functions that go to the heart of representative government.'" 454 U. S., at 440 (quoting *Sugarman* v. *Dougall*, *supra*, at 647).[7]

III

We now turn to Article 5949(2) to determine whether it satisfies the *Cabell* test. The statute provides that "[t]o be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this state . . ." Unlike the statute invalidated in *Sugarman*, Article 5949(2) does not indiscriminately sweep within its ambit a wide range of offices and occupations but specifies only one particular post with respect to which the State asserts a right to exclude aliens. Clearly, then, the statute is not overinclusive; it applies narrowly to only one category of persons: those wishing to obtain appointments as notaries. Less clear is whether Article 5949(2) is fatally underinclusive. Texas does not require court reporters to be United States citizens even though they perform some of the same services as notaries.[8] Nor does Texas require that its Secretary of State be a citizen,[9] even though he holds the highest appointive position in the State and performs many important functions, including supervision of the licensing of all notaries public.[10] We need not decide this issue, however, because of our decision with respect to the second prong of the *Cabell* test.

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[7] We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a "discrete and insular" minority for whom heightened judicial solicitude is appropriate. See *Nyquist* v. *Mauclet*, 432 U. S. 1, 11 (1977).

[8] Like notaries public, court reporters are authorized to administer oaths and take depositions. Tex. Rev. Civ. Stat. Ann., Art. 2324a(1) (Vernon 1971).

[9] Texas appears to require only that the Secretary of State be appointed by the Governor with the advice and consent of the Senate. See Tex. Const., Art. IV, § 21. Respondents, moreover, implicitly concede that the State imposes no citizenship requirement upon the position of Secretary of

In support of the proposition that notaries public fall within that category of officials who perform functions that "go to the heart of representative government," the State emphasizes that notaries are designated as public officers by the Texas Constitution.[11] Texas maintains that this designation indicates that the State views notaries as important officials occupying posts central to the State's definition of itself as a political community. This Court, however, has never deemed the *source* of a position—whether it derives from a State's statute or its Constitution—as the dispositive factor in determining whether a State may entrust the position only to citizens. Rather, this Court has always looked to the actual *function* of the position as the dispositive factor.[12] The

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State. See Brief for Respondents 21–24 (distinguishing notaries public and other officers subject to a citizenship requirement from Secretary of State).

[10] See Tex. Rev. Civ. Stat. Ann., Art. 5949(3) (Vernon Supp. 1984).

[11] The Texas Constitution provides that "[t]he Secretary of State shall appoint a convenient number of Notaries Public for the state. . . ." Art. IV, § 26. Texas is one of only six States in which the State Constitution provides for the appointment of notaries. 1 G. Braden et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 361–362 (1977) (hereinafter Braden).

[12] We note, moreover, that although authorization for the appointment of notaries public has long been a feature of the Texas Constitution, the significance of the position has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries. The Texas Constitution of 1845 authorized the appointment of only six notaries per county and directed that they be appointed by the Governor with the advice and consent of the State Senate. Braden 361. By contrast, the Texas Constitution now authorizes the Secretary of State to appoint a "convenient" number of notaries for each county. Art. IV, § 26; see also Braden 361–362. Counsel for respondents conceded at oral argument that the number of Texas notaries exceeds 100,000. Tr. of Oral Arg. 17 ("I believe, reading Petitioner's brief, that there are in excess of 100,000. Maybe there are 300,000 notaries").

focus of our inquiry has been whether a position was such that the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community. As the Court noted in *Cabell*, in determining whether the function of a particular position brings the position within the narrow ambit of the exception, "the Court will look to the importance of the function as a factor giving substance to the concept of democratic self-government." 454 U. S., at 441, n. 7.

The State maintains that even if the actual function of a post is the touchstone of a proper analysis, Texas notaries public should still be classified among those positions from which aliens can properly be excluded because the duties of Texas notaries entail the performance of functions sufficiently consequential to be deemed "political."[13] The Court of Appeals ably articulated this argument:

> "With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out-of-court depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day-to-day functioning of state government. The Texas political community depends upon the notary public to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that

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[13] "Notaries Public shall have the same authority to take acknowledgments or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks. . . ." Tex. Rev. Civ. Stat. Ann., Art. 5954 (Vernon Supp. 1984). County clerks are authorized to record and acknowledge a wide range of documents. Art. 6591 (Vernon 1969) ("County clerks shall be the recorders for their respective counties").

> oaths are properly and accurately administered. Land titles and property succession depend upon the care and integrity of the notary public, as well as the familiarity of the notary with the community, to verify the authenticity of the execution of the documents." 710 F. 2d, at 194.

We recognize the critical need for a notary's duties to be carried out correctly and with integrity. But a notary's duties, important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial. In contrast to state troopers, *Foley* v. *Connelie*, 435 U. S. 291 (1978), notaries do not routinely exercise the State's monopoly of legitimate coercive force.[14] Nor do notaries routinely exercise the wide discretion typically enjoyed by public school teachers when they present materials that educate youth respecting the information and values necessary for the maintenance of a democratic political system. See *Ambach* v. *Norwick*, 441 U. S., at 77. To be sure, considerable damage could result from the negligent or dishonest performance of a notary's duties. But the same could be said for the duties performed by cashiers, building inspectors, the janitors who clean up the offices of public officials, and numerous other categories of personnel upon whom we depend for careful, honest service. What distinguishes such personnel from those to whom the political-function exception is properly applied is that the latter are invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Neither of these characteristics pertains to the functions performed by Texas notaries.

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[14] At oral argument, counsel for respondents observed in passing that Texas authorizes notaries to subpoena witnesses for the purpose of obtaining testimony regarding the authenticity of a document, Tex. Rev. Civ. Stat. Ann., Art. 6616 (Vernon 1969), and also authorizes notaries to enforce this authority with civil contempt powers. Art. 6618. We do not consider the notary's apparent power to hold persons in contempt at all analogous to the coercive power routinely exercised by policemen, judges, or other officers charged with the administration of justice. One indication that this power is merely formal with no relevance to day-to-day experience is that it seems to have figured in only two reported cases, the most recent of which was decided over 40 years ago in 1942. See *Ex parte Wolf*, 116 Tex. Crim. 127, 34 S. W. 2d 277 (1930); *Harbison* v. *McMurray*, 138 Tex. 192, 158 S. W. 2d 284 (1942). That it was not even mentioned in respondents' brief is a further indication that this power is moribund. Cf. *Jii* v. *Rhodes*, 577 F. Supp., at 1131 (political-function exception not applicable to notary public notwithstanding notary's statutory authorization to hold recalcitrant witness in contempt).

The inappropriateness of applying the political-function exception to Texas notaries is further underlined by our decision in *In re Griffiths*, 413 U. S. 634 (1973), in which we subjected to strict scrutiny a Connecticut statute that prohibited noncitizens from becoming members of the State Bar. Along with the usual powers and privileges accorded to members of the bar, Connecticut gave to members of its Bar additional authority that encompasses the very duties performed by Texas notaries—authority to "'sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds.'" *Id.*, at 723 (quoting Connecticut statute).[15] In striking down Connecticut's citizenship requirement, we concluded that "[i]t in no way denigrates a lawyer's high responsibilities to observe that [these duties] hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Id.*, at 724. If it is improper to apply the political-function exception to a citizenship requirement governing eligibility for membership in a state bar, it would be anomalous to apply the exception to the citizenship requirement that governs eligibility to become a Texas notary. We conclude, then, that the "political function" exception is inapplicable to Article 5949(2) and that the statute is therefore subject to strict judicial scrutiny.

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[15] In Connecticut, members of the Bar were empowered to function both as attorneys and as commissioners of the Superior Court. The former position entailed lawyer's work; the latter, work that is often performed by notaries public. See *In Re Griffiths*, 413 U. S., at 723–725.

IV

To satisfy strict scrutiny, the State must show that Article 5949(2) furthers a compelling state interest by the least restrictive means practically available. Respondents maintain that Article 5949(2) serves its "legitimate concern that notaries be reasonably familiar with state law and institutions" and "that notaries may be called upon years later to testify to acts they have performed." Brief for Respondents 24–25. However, both of these asserted justifications utterly fail to meet the stringent requirements of strict scrutiny. There is nothing in the record that indicates that resident aliens, as a class, are so incapable of familiarizing themselves with Texas law as to justify the State's absolute and classwide exclusion. The possibility that some resident aliens are unsuitable for the position cannot justify a wholesale ban against all resident aliens. Furthermore, if the State's concern with ensuring a notary's familiarity with state law were truly "compelling," one would expect the State to give some sort of test actually measuring a person's familiarity with the law. The State, however, administers no such test. To become a notary public in Texas, one is merely required to fill out an application that lists one's name and address and that answers four questions pertaining to one's age, citizenship, residency, and criminal record[16]—nothing that reflects the State's asserted interest in ensuring that notaries are familiar with Texas law. Similarly inadequate is the State's purported interest in ensuring the later availability of notaries' testimony. This justification fails because the State fails to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State's asserted interest lacks the weight we have required of interests properly denominated as compelling.[17]

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[16] See Tex. Rev. Civ. Stat. Ann., Art. 5949(3)(a) (Vernon Supp. 1984).

V

We conclude that Article 5949(2) violates the Fourteenth Amendment of the United States Constitution. Accordingly the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Sugarman* v. *Dougall*, 413 U. S. 634, 649 (1973).

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[17] The State did not even attempt to defend the statute against strict scrutiny, perhaps recognizing that such a defense would be futile. Rather, the State simply asserted that the statute could withstand the lesser scrutiny of rationality review. See Brief for Respondents 24.

HAWAII HOUSING AUTHORITY ET AL. *v.* MIDKIFF ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-141. Argued March 26, 1984—Decided May 30, 1984*

To reduce the perceived social and economic evils of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership. Under the Act, lessees living on single-family residential lots within tracts at least five acres in size are entitled to ask appellant Hawaii Housing Authority (HHA) to condemn the property on which they live. When appropriate applications by lessees are filed, the Act authorizes HHA to hold a public hearing to determine whether the State's acquisition of the tract will "effectuate the public purposes" of the Act. If HHA determines that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set by a condemnation trial or by negotiation between lessors and lessees, the former fee owners' "right, title, and interest" in the land, and may then sell the land titles to the applicant lessees. After HHA had held a public hearing on the proposed acquisition of appellees' lands and had found that such acquisition would effectuate the Act's public purposes, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. When these negotiations failed, HHA ordered appellees to submit to compulsory arbitration as provided by the Act. Rather than comply with this order, appellees filed suit in Federal District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The court temporarily restrained the State from proceeding against appellees' estates, but subsequently, while holding the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, refused to issue a preliminary injunction and ultimately granted partial summary judgment to HHA and private appellants who had intervened, holding

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*Together with No. 83-236, *Portlock Community Association (Maunalua Beach) et al.* v. *Midkiff et al.*; and No. 83-283, *Kahala Community Association, Inc., et al.* v. *Midkiff et al.*, also on appeal from the same court.

the remainder of the Act constitutional under the Public Use Clause of the Fifth Amendment, made applicable to the States under the Fourteenth Amendment. After deciding that the District Court had properly not abstained from exercising its jurisdiction, the Court of Appeals reversed, holding that the Act violates the "public use" requirement of the Fifth Amendment.

Held:

1. The District Court was not required to abstain from exercising its jurisdiction. Pp. 236–239.

(a) Abstention under *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, is unnecessary. *Pullman* abstention is limited to uncertain questions of state law, and here there is no uncertain question of state law, since the Act unambiguously provides that the power to condemn is "for a public use and purpose." Thus, the question, uncomplicated by ambiguous language, is whether the Act on its face is unconstitutional. Pp. 236–237.

(b) Nor is abstention required under *Younger* v. *Harris*, 401 U. S. 37. *Younger* abstention is required only when state-court proceedings are initiated before any proceedings of substance on the merits have occurred in federal court. Here, state judicial proceedings had not been initiated at the time proceedings of substance took place in the District Court, the District Court having issued a preliminary injunction before HHA filed its first state eminent domain suit in state court. And the fact that HHA's administrative proceedings occurred before the federal suit was filed did not require abstention, since the Act clearly states that those proceedings are not part of, or are not themselves, a judicial proceeding. Pp. 237–239.

2. The Act does not violate the "public use" requirement of the Fifth Amendment. Pp. 239–244.

(a) That requirement is coterminous with the scope of a sovereign's police powers. This Court will not substitute its judgment for a legislature's judgment as to what constitutes "public use" unless the use is palpably without reasonable foundation. Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking is not prohibited by the Public Use Clause. Here, regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers, and redistribution of fees simple to reduce such evils is a rational exercise of the eminent domain power. Pp. 239–243.

(b) The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate. Pp. 243–244.

702 F. 2d 788, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the cases.

Laurence H. Tribe, Special Deputy Attorney General of Hawaii, argued the cause for appellants. With him on the briefs for appellants in Nos. 83–141 and 83–283 were *Kathleen M. Sullivan* and *David Rosenberg*, Special Deputy Attorneys General, *Tany S. Hong*, Attorney General, *Michael A. Lilly*, First Deputy Attorney General, *Dennis E. W. O'Connor, James H. Case*, and *A. Bernard Bays*. *Richard J. Archer* and *Corey Y. S. Park* filed briefs for appellants in No. 83–236.

Clinton R. Ashford argued the cause for appellees. With him on the brief were *E. Barrett Prettyman, Jr., B. Evan Bayh III, Rosemary T. Fazio, G. Richard Morry*, and *Earl T. Sato*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.

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†Briefs of *amici curiae* urging affirmance were filed for the Office of Hawaiian Affairs by *H. K. Bruss Keppeler;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Harold J. Hughes;* and for the Queen Liliuokalani Trust et al. by *Daniel H. Case.*

William A. Dobrovir and *Joseph D. Gebhardt* filed a brief for the Hou Hawaiians et al. as *amici curiae.*

I

A

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land. See generally Brief for Office of Hawaiian Affairs as *Amicus Curiae* 3–5.

Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. See Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as *Amici Curiae* 32. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 32–33. The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

To redress these problems, the legislature decided to compel the large landowners to break up their estates. The legislature considered requiring large landowners to sell lands which they were leasing to homeowners. However, the landowners strongly resisted this scheme, pointing out the significant federal tax liabilities they would incur. Indeed, the landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands. Therefore, to accommodate the needs of both lessors and lessees, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), Haw. Rev. Stat., ch. 516, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple. See Brief for Appellants in Nos. 83–141 and 83–283, pp. 3–4, and nn. 6–8.

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. Haw. Rev. Stat. §§ 516–1(2), (11), 516–22 (1977). When 25 eligible tenants,[1] or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. § 516–22. If HHA finds that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees,[2] the former fee owners' full "right, title, and interest" in the land. § 516-25.

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[1] An eligible tenant is one who, among other things, owns a house on the lot, has a bona fide intent to live on the lot or be a resident of the State, shows proof of ability to pay for a fee interest in it, and does not own residential land elsewhere nearby. Haw. Rev. Stat. §§ 516–33(3), (4), (7) (1977).

After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership. HHA is authorized to lend these tenants up to 90% of the purchase price, and it may condition final transfer on a right of first refusal for the first 10 years following sale. §§ 516-30, 516-34, 516-35. If HHA does not sell the lot to the tenant residing there, it may lease the lot or sell it to someone else provided that public notice has been given. § 516-28. However, HHA may not sell to any one purchaser, or lease to any one tenant, more than one lot, and it may not operate for profit. §§ 516-28, 516-32. In practice, funds to satisfy the condemnation awards have been supplied entirely by lessees. See App. 164. While the Act authorizes HHA to issue bonds and appropriate funds for acquisition, no bonds have issued and HHA has not supplied any funds for condemned lots. See *ibid.*

B

In April 1977, HHA held a public hearing concerning the proposed acquisition of some of appellees' lands. HHA made the statutorily required finding that acquisition of appellees' lands would effectuate the public purposes of the Act. Then, in October 1978, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. Those negotiations failed, and HHA subsequently ordered appellees to submit to compulsory arbitration.

Rather than comply with the compulsory arbitration order, appellees filed suit, in February 1979, in United States District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The District Court temporarily restrained the State from proceeding against appellees' estates. Three months later, while declaring the compulsory arbitration and compensation formulae provisions of the Act unconstitutional,[3] the District Court refused preliminarily to enjoin appellants from conducting the statutory designation and condemnation proceedings. Finally, in December 1979, it granted partial summary judgment to appellants, holding the remaining portion of the Act constitutional under the Public Use Clause. See 483 F. Supp. 62 (Haw. 1979). The District Court found that the Act's goals were within the bounds of the State's police powers and that the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith.

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[2] See § 516-56 (Supp. 1983). In either case, compensation must equal the fair market value of the owner's leased fee interest. § 516-1(14). The adequacy of compensation is not before us.

The Court of Appeals for the Ninth Circuit reversed. 702 F. 2d 788 (1983). First, the Court of Appeals decided that the District Court had permissibly chosen not to abstain from the exercise of its jurisdiction. Then, the Court of Appeals determined that the Act could not pass the requisite judicial scrutiny of the Public Use Clause. It found that the transfers contemplated by the Act were unlike those of takings previously held to constitute "public uses" by this Court. The court further determined that the public purposes offered by the Hawaii Legislature were not deserving of judicial deference. The court concluded that the Act was simply "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.*, at 798. One judge dissented.

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[3] As originally enacted, lessor and lessee had to commence compulsory arbitration if they could not agree on a price for the fee simple title. Statutory formulae were provided for the determination of compensation. The District Court declared both the compulsory arbitration provision and the compensation formulae unconstitutional. No appeal was taken from these rulings, and the Hawaii Legislature subsequently amended the statute to provide only for mandatory negotiation and for advisory compensation formulae. These issues are not before us.

On applications of HHA and certain private appellants who had intervened below, this Court noted probable jurisdiction. 464 U. S. 932 (1983). We now reverse.

II

We begin with the question whether the District Court abused its discretion in not abstaining from the exercise of its jurisdiction. The appellants have suggested as one alternative that perhaps abstention was required under the standards announced in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), and *Younger* v. *Harris*, 401 U. S. 37 (1971). We do not believe that abstention was required.

A

In *Railroad Comm'n* v. *Pullman Co.*, *supra*, this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies . . . ." *Id.*, at 500. However, federal courts need not abstain on *Pullman* grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" adjudication of the federal constitutional question. See *Harman* v. *Forssenius*, 380 U. S. 528, 535 (1965). *Pullman* abstention is limited to uncertain questions of state law because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976).

In these cases, there is no uncertain question of state law. The Act unambiguously provides that "[t]he use of the power . . . to condemn . . . is for a public use and purpose." Haw. Rev. Stat. § 516–83(a)(12) (1977); see also §§ 516–83(a)(10), (11), (13). There is no other provision of the Act—or, for that matter, of Hawaii law—which would suggest that

§ 516–83(a)(12) does not mean exactly what it says. Since "the naked question, uncomplicated by [ambiguous language], is whether the Act on its face is unconstitutional," *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971), abstention from federal jurisdiction is not required.

The dissenting judge in the Court of Appeals suggested that, perhaps, the state courts could make resolution of the federal constitutional questions unnecessary by their construction of the Act. See 702 F. 2d, at 811–812. In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler* v. *Koota*, 389 U. S. 241, 251, and n. 14 (1967). These statutes are not of an uncertain nature and have no reasonable limiting construction. Therefore, *Pullman* abstention is unnecessary.[4]

B

The dissenting judge also suggested that abstention was required under the standards articulated in *Younger* v. *Harris*, *supra*. Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. See *Middlesex Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423, 432–437 (1982). *Younger* abstention is required, however, only when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." *Hicks* v. *Miranda*, 422 U. S. 332, 349 (1975). In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

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[4] The dissenting judge's suggestion that *Pullman* abstention was required because interpretation of the State Constitution may have obviated resolution of the federal constitutional question is equally faulty. Hawaii's Constitution has only a parallel requirement that a taking be for a public use. See Haw. Const., Art. I, § 20. The Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions. See *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 598 (1976); see also *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971).

In these cases, state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court. Appellees filed their federal court complaint in February 1979, asking for temporary and permanent relief. The District Court temporarily restrained HHA from proceeding against appellees' estates. At that time, no state judicial proceedings were in process. Indeed, in June 1979, when the District Court granted, in part, appellees' motion for a preliminary injunction, state court proceedings still had not been initiated. Rather, HHA filed its first eminent domain lawsuit *after* the parties had begun filing motions for summary judgment in the District Court—in September 1979. Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 929–931 (1975). A federal court action in which a preliminary injunction is granted has proceeded well beyond the "embryonic stage," *id.*, at 929, and considerations of economy, equity, and federalism counsel against *Younger* abstention at that point.

The only extant proceedings at the state level prior to the September 1979 eminent domain lawsuit in state court were HHA's administrative hearings. But the Act clearly states that these administrative proceedings are not part of, and are not themselves, a judicial proceeding, for "mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain." Haw. Rev. Stat. § 516–51(b) (1976). Since *Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced, see *Middlesex County Ethics Committee* v. *Garden State Bar Assn., supra*, at 433; *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 112–113 (1981), abstention for HHA's administrative proceedings was not required.

III

The majority of the Court of Appeals next determined that the Act violates the "public use" requirement of the Fifth and Fourteenth Amendments. On this argument, however, we find ourselves in agreement with the dissenting judge in the Court of Appeals.

A

The starting point for our analysis of the Act's constitutionality is the Court's decision in *Berman* v. *Parker*, 348 U. S. 26 (1954). In *Berman*, the Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided both for the comprehensive use of the eminent domain power to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests. In discussing whether the takings authorized by that Act were for a "public use," *id.*, at 31, the Court stated:

> "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it

> be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ." *Id.*, at 32 (citations omitted).

The Court explicitly recognized the breadth of the principle it was announcing, noting:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.*, at 33.

The "public use" requirement is thus coterminous with the scope of a sovereign's police powers.

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. *Id.*, at 32. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA* v. *Welch*, 327 U. S. 546, 552 (1946), which emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 680 (1896).

To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Corp.*, 300 U. S. 55, 80 (1937). See, *e. g.*, *Cincinnati* v. *Vester*, 281 U. S. 439, 447 (1930); *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251–252 (1905); *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159 (1896). Thus, in *Missouri Pacific R. Co.* v. *Nebraska*, 164 U. S. 403 (1896), where the "order in question was not, *and was not claimed to be*, . . . a taking of private property for a public use under the right of eminent domain," *id.*, at 416 (emphasis added), the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. See *Berman* v. *Parker*, *supra;* *Rindge Co.* v. *Los Angeles*, 262 U. S. 700 (1923); *Block* v. *Hirsh*, 256 U. S. 135 (1921); cf. *Thompson* v. *Consolidated Gas Corp.*, *supra* (invalidating an *uncompensated* taking).

On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did,[5] to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978); *Block* v. *Hirsh*, *supra;* see also *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F. 2d 316 (CA1), cert. denied, 329 U. S. 772 (1946). We cannot disapprove of Hawaii's exercise of this power.

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[5] After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. See, *e. g.*, Act of May 1779, 10 Henning's Statutes At Large 64, ch. 13, § 6 (1822) (Virginia statute); Divesting Act of

Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signalled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure.

Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U. S. 648, 671–672 (1981); see also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981); *Vance* v. *Bradley*, 440 U. S. 93, 112 (1979). When the legislature's purpose is legitimate and its

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1779, 1775–1781 Pa. Acts 258, ch. 139 (1782) (Pennsylvania statute). Courts have never doubted that such statutes served a public purpose. See, *e. g.*, *Wilson* v. *Iseminger*, 185 U. S. 55, 60–61 (1902); *Stewart* v. *Gorter*, 70 Md. 242, 244–245, 16 A. 644, 645 (1889).

means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.[6]

B

The Court of Appeals read our cases to stand for a much narrower proposition. First, it read our "public use" cases, especially *Berman*, as requiring that government possess and use property at some point during a taking. Since Hawaiian lessees retain possession of the property for private use throughout the condemnation process, the court found that the Act exacted takings for private use. 702 F. 2d, at 796–797. Second, it determined that these cases involved only "the review of . . . *congressional* determination[s] that there was a public use, *not* the review of . . . state legislative determination[s]." *Id.*, at 798 (emphasis in original). Because state legislative determinations are involved in the instant cases, the Court of Appeals decided that more rigorous judicial scrutiny of the public use determinations was appropriate. The court concluded that the Hawaii Legislature's professed purposes were mere "statutory rationalizations." *Ibid.* We disagree with the Court of Appeals' analysis.

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co.* v. *Los Angeles*, 262 U. S., at 707. "[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair." *Block* v. *Hirsh*, 256 U. S., at 155. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

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[6] We similarly find no merit in appellees' Due Process and Contract Clause arguments. The argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in *New Motor Vehicle Board* v. *Fox Co.*, 439 U. S. 96, 108–109 (1978). Similarly, the Contract Clause has never been thought to protect against the exercise of the power of eminent domain. See *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 19, and n. 16 (1977).

Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate.[7] Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. See *Berman* v. *Parker*, 348 U. S., at 32. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

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[7] It is worth noting that the Fourteenth Amendment does not itself contain an independent "public use" requirement. Rather, that requirement is made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897). It would be ironic to find that state legislation is subject to greater scrutiny under the incorporated "public use" requirement than is congressional legislation under the express mandate of the Fifth Amendment.

IV

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied. Accordingly, we reverse the judgment of the Court of Appeals, and remand these cases for further proceedings in conformity with this opinion.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of these cases.

NEW YORK *v.* UPLINGER ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 82–1724. Argued January 18, 1984—Decided May 30, 1984

Respondents, charged with violating a New York statute prohibiting loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature," challenged its constitutionality, and the New York Court of Appeals sustained their claim. This Court granted certiorari.

Held: Where (1) the precise federal constitutional grounds relied upon by the Court of Appeals is uncertain; (2) whatever the constitutional basis of the lower court's decision, it was premised on its earlier decision in another case so that a meaningful evaluation of the decision below would entail consideration of the question decided in the other case; and (3) petitioner does not challenge the decision in the other case, the instant case provides an inappropriate vehicle for resolving the constitutional issues raised. Accordingly, the writ of certiorari is dismissed as improvidently granted.

Certiorari dismissed. Reported below: 58 N. Y. 2d 936, 447 N. E. 2d 62.

Richard J. Arcara argued the cause for petitioner. With him on the briefs were *John J. DeFranks* and *Louis A. Haremski.*

William H. Gardner argued the cause for respondents. With him on the brief for respondent Uplinger was *Thomas F. Coleman. Rose H. Sconiers* and *Joseph B. Mistrett* filed a brief for respondent Butler.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Association for Personal Privacy et al. by *Melvin L. Wulf* and *David A. J. Richards;* for the American Civil Liberties Union et al. by *Steven R. Shapiro, Burt Neuborne,* and *Charles S. Sims;* for the American Psychological Association et al. by *Margaret Farrell Ewing, Bruce J. Ennis,* and *Donald N. Bersoff;* for the Committee on Sex and Law of the Association of the Bar of the City of New York et al. by *Mark H. Leeds, Michael A. Bamberger, John H. Doyle III,* and *Edward M. Shaw;* and for the Lambda Legal Defense and Education Fund, Inc., by *Mary C. Dunlap, Abby R. Rubenfeld,* and *Nan D. Hunter.*

Briefs of *amici curiae* were filed for the Attorney General of the State of New York by *Robert Abrams,* Attorney General, *pro se,* and *Rosemarie*

PER CURIAM.

We granted certiorari, 464 U. S. 812 (1983), to review a decision of the New York Court of Appeals concerning N. Y. Penal Law § 240.35(3) (McKinney 1980), which prohibits loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Respondents, charged with violating the statute, challenged its constitutionality and the Court of Appeals sustained their claim. 58 N. Y. 2d 936, 447 N. E. 2d 62 (1983). The court concluded that § 240.35(3) is "a companion statute to the consensual sodomy statute . . . which criminalized acts of deviate sexual intercourse between consenting adults" and noted that it had previously held the latter statute unconstitutional in *People* v. *Onofre*, 51 N. Y. 2d 476, 415 N. E. 2d 936 (1980), which we declined to review, see 451 U. S. 987 (1981). 58 N. Y. 2d, at 937–938, 447 N. E. 2d, at 62–63. Construing the loitering statute as intended "to punish conduct anticipatory to the act of consensual sodomy," the Court of Appeals reasoned that "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *Id.*, at 938, 447 N. E. 2d, at 63.

Petitioner challenges the decision of the Court of Appeals on the ground that the loitering statute is a valid exercise of the State's power to control public order.[1] Respondents, on

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Rhodes, *Lawrence S. Kahn*, and *Jane Levine*, Assistant Attorneys General; for the Center for Constitutional Rights et al. by *Rhonda Copelon* and *Anne E. Simon;* and for the National Association of Business Councils et al. by *Laurence R. Sperber* and *Jay M. Kohorn.*

[1] Petitioner, the State of New York, is represented in this Court by the District Attorney for Erie County, N. Y., the prosecutor who brought the criminal charges against respondents. After certiorari was granted, however, the Attorney General of the State of New York filed a brief as *amicus curiae*, urging us to conclude that the loitering statute as applied in this case violates respondents' federal constitutional rights to freedom of

the other hand, defend the decision by arguing that the statute is unconstitutionally vague and overbroad on its face and that, as applied, it violates their First Amendment, equal protection, and due process rights. We decline to address these arguments, however, because examination of the case, after full briefing and oral argument, has convinced us that the writ of certiorari was improvidently granted. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184 (1959).

As the diverse arguments presented in the briefs have demonstrated, the opinion of the Court of Appeals is fairly subject to varying interpretations, leaving us uncertain as to the precise federal constitutional issue the court decided.[2] Moreover, whatever the constitutional basis of the Court of

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speech and privacy but suggesting that the court below erred in striking down the statute on its face.

The allocation of authority among state officers to represent the State before this Court is, of course, wholly a matter of state concern. As our Rule 36.4 indicates, however, in addressing the constitutionality of a statute with statewide application we consider highly relevant the views of the State's chief law enforcement official. The fundamental conflict in the positions taken by petitioner and the New York Attorney General, a circumstance which was "not manifest or fully apprehended at the time certiorari was granted," *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 559 (1957) (Harlan, J., concurring and dissenting), provides a strong additional reason for our conclusion that the grant of certiorari was improvident. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184 (1959).

[2] Under one fair reading of the opinion below, we may not even have jurisdiction to review the Court of Appeals' decision. See *Dorchy* v. *Kansas*, 264 U. S. 286, 290 (1924). The New York court determined, as a matter of state law, that the statute prohibits speech, whether harassing or not, anticipatory to consensual sodomy. Accordingly, the court's holding might be based on a conclusion that as a matter of state law, the statute at issue here was intended only to provide an additional means of enforcing the statute struck down in *Onofre* and therefore was not severable from that statute. See 58 N. Y. 2d, at 937–938, 447 N. E. 2d, at 62–63 ("[I]t is apparent from the wording of this statute that it was aimed at proscribing overtures, not necessarily bothersome to the recipient, leading to what was, at the time the law was enacted, an illegal act").

Appeals' decision, it was clearly premised on the court's earlier decision in *People* v. *Onofre*, *supra*, and for that reason a meaningful evaluation of the decision below would entail consideration of the questions decided in that case. Petitioner does not, however, challenge the decision of the New York Court of Appeals in that case. See Brief for Petitioner 2. Cf. Pet. for Cert. 6, n. 1.

Under these circumstances, we are persuaded that this case provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties. We therefore dismiss the writ of certiorari as improvidently granted.

It is so ordered.

JUSTICE STEVENS, concurring.

Although the origins of the Rule of Four are somewhat obscure,[1] its administration during the past 60 years has undergone a number of changes.[2] Even though our decision today makes no change in the Rule, I regard it as sufficiently significant to warrant these additional comments.

I first note that I agree with the reasons set forth in the *per curiam* opinion for not deciding this case. I would add (1) that the major reasons were apparent when the certiorari petition was filed, and (2) that our jurisdiction over this case is problematic at best because the most straightforward interpretation of the New York Court of Appeals' opinion is that the statutory provision at issue in this case is not severable, as a matter of state law, from the provision invalidated in *People* v. *Onofre*, 51 N. Y. 2d 476, 415 N. E. 2d 936 (1980), cert. denied, 451 U. S. 987 (1981). The Court, quite correctly in my opinion, therefore declines to address the merits.

Four Members of the Court believe, however, that the merits "should be addressed." *Post*, at 252. They do not, however, address the merits themselves. Cf. *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (concurring opinion). Nor do they attempt to refute the sound reasons offered by the majority for dismissing the writ as improvidently granted. As long as we adhere to the Rule of Four, four Justices have the power to require that a case be briefed, argued, and considered at a postargument conference. Why, then, should they not also have the power to command that its merits be decided by the Court?

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[1] See Leiman, The Rule of Four, 57 Colum. L. Rev. 975, 981–982 (1957).

[2] See Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 11–14 (1983).

The difference in the character of the decision to hear a case and the decision to decide it justifies a difference in the way the decision should be made. As long as we act prudently in selecting cases for review,[3] there is relatively little to be lost, and a great deal to be gained, by permitting four Justices who are convinced that a case should be heard to have it placed on the calendar for argument. It might be suggested that the case must be decided unless there has been an intervening development that justifies a dismissal. See generally *Rice* v. *Sioux City Cemetery*, 349 U. S. 70 (1955). I am now persuaded, however, that there is *always* an important intervening development that may be decisive. The Members of the Court have always considered a case more carefully after full briefing and argument on the merits than they could at the time of the certiorari conference, when almost 100 petitions must be considered each week.[4] Nevertheless, once a case has been briefed, argued, and studied in chambers, sound principles of judicial economy normally outweigh most reasons advanced for dismissing a case. Indeed, in many cases, the majority may remain convinced that the case does not present a question of general significance warranting this Court's review, but nevertheless proceed to decide the case on the merits because there is no strong countervailing reason to dismiss after the large investment of resources by the parties and the Court.

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[3] We have granted review in approximately 50 fewer cases thus far this Term than we had at the corresponding point in the October 1981 Term.

[4] A particularly dramatic example of the contrast between the quality of decisionmaking after argument as compared with that prior to studying the merits is provided by the contrast between the virtually unanimous decision to deny the application for a stay in *Palmore* v. *Sidoti*, 460 U. S. 1018 (1983), and the unanimous decision to reverse the decision below on the merits, 466 U. S. 429 (1984).

A decision on the merits does, of course, have serious consequences, particularly when a constitutional issue is raised, and most especially when the constitutional issue presents questions of first impression. The decision to decide a constitutional question may be the most momentous decision that can be made in a case. Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible. See generally *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). The policy of judicial restraint is most salient in this Court, given its role as the ultimate expositor of the meaning of the Constitution, and "perhaps the most effective implement for making the policy effective has been the certiorari jurisdiction conferred upon this Court by Congress." *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 (1947). If a majority is convinced after studying the case that its posture, record, or presentation of issues makes it an unwise vehicle for exercising the "gravest and most delicate" function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case.

In conclusion, the Rule of Four is a valuable, though not immutable, device for deciding when a case must be argued, but its force is largely spent once the case has been heard. At that point, a more fully informed majority of the Court must decide whether some countervailing principle outweighs the interest in judicial economy in deciding the case.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

As I see it, the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed. Dismissing this case as improvidently granted is not the proper course.

SCHALL, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE *v.* MARTIN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82–1248. Argued January 17, 1984—Decided June 4, 1984*

Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." Appellees, juveniles who had been detained under § 320.5(3)(b), brought a habeas corpus class action in Federal District Court, seeking a declaratory judgment that § 320.5(3)(b) violates, *inter alia*, the Due Process Clause of the Fourteenth Amendment. The District Court struck down the statute as permitting detention without due process and ordered the release of all class members. The Court of Appeals affirmed, holding that since the vast majority of juveniles detained under the statute either have their cases dismissed before an adjudication of delinquency or are released after adjudication, the statute is administered, not for preventive purposes, but to impose punishment for unadjudicated criminal acts, and that therefore the statute is unconstitutional as to all juveniles.

Held: Section 320.5(3)(b) is not invalid under the Due Process Clause of the Fourteenth Amendment. Pp. 263–281.

(a) Preventive detention under the statute serves the legitimate state objective, held in common with every State, of protecting both the juvenile and society from the hazards of pretrial crime. That objective is compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings, and the terms and condition of confinement under § 320.5(3)(b) are compatible with that objective. Pretrial detention need not be considered punishment merely because a juvenile is subsequently discharged subject to conditions or put on probation. And even when a case is terminated prior to factfinding, it does not follow that the decision to detain the juvenile pursuant to § 320.5(3)(b) amounts to a due process violation. Pp. 264–274.

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*Together with No. 82–1278, *Abrams, Attorney General of New York* v. *Martin et al.*, also on appeal from the same court.

(b) The procedural safeguards afforded by the Family Court Act to juveniles detained under § 320.5(3)(b) prior to factfinding provide sufficient protection against erroneous and unnecessary deprivations of liberty. Notice, a hearing, and a statement of facts and reasons are given to the juvenile prior to any detention, and a formal probable-cause hearing is then held within a short time thereafter, if the factfinding hearing is not itself scheduled within three days. There is no merit to the argument that the risk of erroneous and unnecessary detention is too high despite these procedures because the standard for detention is fatally vague. From a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a prediction is an experienced one based on a host of variables that cannot be readily codified. Moreover, the postdetention procedures—habeas corpus review, appeals, and motions for reconsideration—provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detention. Pp. 274–281.

689 F. 2d 365, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 281.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for appellants in both cases. With her on the briefs for appellant in No. 82–1278 were *Robert Abrams*, Attorney General, *pro se*, *Peter H. Schiff*, *Melvyn R. Leventhal*, Deputy First Assistant Attorney General, *George D. Zuckerman*, Deputy Solicitor General, and *Robert J. Schack*, Assistant Attorney General. *Frederick A. O. Schwarz, Jr.*, *Leonard Koerner*, and *Ronald E. Sternberg* filed a brief for appellant in No. 82–1248.

Martin Guggenheim argued the cause for appellees in both cases. With him on the brief were *Burt Neuborne*, *Janet R. Fink*, and *Charles A. Hollander*.†

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†A brief of *amici curiae* urging reversal was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Kathleen F. McGrath*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Charles Graddick* of Alabama, *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of

JUSTICE REHNQUIST delivered the opinion of the Court.

Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the child "may before the return date commit an act which if committed by an adult would constitute a crime."[1] Appellees brought suit on behalf of a class of all juveniles detained pur-

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Arizona, *John K. Van De Kamp* of California, *Jim Smith* of Florida, *Tany S. Hong* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Michael T. Greeley* of Montana, *Paul L. Douglas* of Nebraska, *Gregory H. Smith* of New Hampshire, *Anthony J. Celebrezze, Jr.*, of Ohio, *Dave Frohnmayer* of Oregon, *T. Travis Medlock* of South Carolina, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Kenneth O. Eikenberry* of Washington, *A. G. McClintock* of Wyoming, and *Aviata F. Faalevao* of American Samoa.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Wallace D. Riley*, *Andrew J. Shookhoff*, and *Steven H. Goldblatt;* for the Association for Children of New Jersey by *Dennis S. Brotman;* for the National Juvenile Law Center by *Harry F. Swanger;* for the National Legal Aid and Defender Association by *Michael J. Dale;* for the Public Defender Service for the District of Columbia by *Francis D. Carter* and *James H. McComas;* and for the Youth Law Center et al. by *Mark I. Soler*, *Loren M. Warboys*, *James R. Bell*, and *Robert G. Schwartz.*

David Crump filed a brief for the Texas District and County Attorneys Association et al. as *amici curiae.*

[1] New York Jud. Law § 320.5 (McKinney 1983) (Family Court Act (hereinafter FCA)) provides, in relevant part:

"1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.

. . . . .

"3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained;

"(a) there is a substantial probability that he will not appear in court on the return date; or

"(b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime."

Appellees have only challenged pretrial detention under § 320.5(3)(b). Thus, the propriety of detention to ensure that a juvenile appears in court on the return date, pursuant to § 320.5(3)(a), is not before the Court.

suant to that provision.[2] The District Court struck down § 320.5(3)(b) as permitting detention without due process of law and ordered the immediate release of all class members. *United States ex rel. Martin* v. *Strasburg*, 513 F. Supp. 691 (SDNY 1981). The Court of Appeals for the Second Circuit affirmed, holding the provision "unconstitutional as to all juveniles" because the statute is administered in such a way that "the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard." *Martin* v. *Strasburg*, 689 F. 2d 365, 373–374 (1982). We noted probable jurisdiction, 460 U. S. 1079 (1983),[3] and now reverse. We conclude that preventive detention under the FCA serves a legitimate state objective, and that the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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[2] The original challenge was to § 739(a)(ii) of the FCA, which, at the time of the commencement of this suit, governed pretrial release or detention of both alleged juvenile delinquents and persons in need of supervision. Effective July 1, 1983, a new Article 3 to the Act governs, *inter alia*, "all juvenile delinquency actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto." FCA § 301.3(1). Article 7 now applies only to proceedings concerning persons in need of supervision.

Obviously, this Court must "review the judgment below in light of the . . . statute as it now stands, not as it once did." *Hall* v. *Beals*, 396 U. S. 45, 48 (1969). But since new Article 3 contains a preventive detention section identical to former § 739(a)(ii), see FCA § 320.5(3), the appeal is not moot. *Brockington* v. *Rhodes*, 396 U. S. 41, 43 (1969).

[3] Although the pretrial detention of the class representatives has long since ended, see *infra*, at 257–261, this case is not moot for the same reason that the class action in *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975), was not mooted by the termination of the claims of the named plaintiffs.

"Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'"

See also *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d 682, 686–687, 350 N. E. 2d 906, 907–908 (1976).

I

Appellee Gregory Martin was arrested on December 13, 1977, and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon based on an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers. See Petitioners' Exhibit 1b. Martin had possession of the gun when he was arrested. He was 14 years old at the time and, therefore, came within the jurisdiction of New York's Family Court.[4] The incident occurred at 11:30 at night, and Martin lied to the police about where and with whom he lived. He was consequently detained overnight.[5]

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[4] In New York, a child over the age of 7 but less than 16 is not considered criminally responsible for his conduct. FCA § 301.2(1). If he commits an act that would constitute a crime if committed by an adult, he comes under the exclusive jurisdiction of the Family Court. § 302.1(1). That court is charged not with finding guilt and affixing punishment, *In re Bogart*, 45 Misc. 2d 1075, 259 N. Y. S. 2d 351 (1963), but rather with determining and pursuing the needs and best interests of the child insofar as those are consistent with the need for the protection of the community. FCA § 301.1. See *In re Craig S.*, 57 App. Div. 2d 761, 394 N. Y. S. 2d 200 (1977). Juvenile proceedings are, thus, civil rather than criminal, although because of the restrictions that may be placed on a juvenile adjudged delinquent, some of the same protections afforded accused adult criminals are also applicable in this context. Cf. FCA § 303.1.

[5] When a juvenile is arrested, the arresting officer must immediately notify the parent or other person legally responsible for the child's care. FCA § 305.2(3). Ordinarily, the child will be released into the custody of his parent or guardian after being issued an "appearance ticket" requiring him to meet with the probation service on a specified day. § 307.1(1). See n. 9, *infra*. If, however, he is charged with a serious crime, one of several designated felonies, see § 301.2(8), or if his parent or guardian cannot be reached, the juvenile may be taken directly before the Family Court. § 305.2. The Family Court judge will make a preliminary deter-

A petition of delinquency was filed,[6] and Martin made his "initial appearance" in Family Court on December 14th, accompanied by his grandmother.[7] The Family Court Judge, citing the possession of the loaded weapon, the false address given to the police, and the lateness of the hour, as evidencing a lack of supervision, ordered Martin detained under § 320.5(3)(b) (at that time § 739(a)(ii); see n. 2, *supra*). A probable-cause hearing was held five days later, on December 19th, and probable cause was found to exist for all the crimes charged. At the factfinding hearing held December 27–29, Martin was found guilty on the robbery and criminal possession charges. He was adjudicated a delinquent and

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mination as to the jurisdiction of the court, appoint a law guardian for the child, and advise the child of his or her rights, including the right to counsel and the right to remain silent.

Only if, as in Martin's case, the Family Court is not in session and special circumstances exist, such as an inability to notify the parents, will the child be taken directly by the arresting officer to a juvenile detention facility. § 305.2(4)(c). If the juvenile is so detained, he must be brought before the Family Court within 72 hours or the next day the court is in session, whichever is sooner. § 307.3(4). The propriety of such detention, prior to a juvenile's initial appearance in Family Court, is not at issue in this case. Appellees challenged only judicially ordered detention pursuant to § 320.5(3)(b).

[6] A delinquency petition, prepared by the "presentment agency," originates delinquency proceedings. FCA § 310.1. The petition must contain, *inter alia*, a precise statement of each crime charged and factual allegations which "clearly apprise" the juvenile of the conduct which is the subject of the accusation. § 311.1. A petition is not deemed sufficient unless the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the juvenile committed the crime or crimes charged. § 311.2(2). Also, nonhearsay allegations in the petition and supporting deposition must establish, if true, every element of each crime charged and the juvenile's commission thereof. § 311.2(3). The sufficiency of a petition may be tested by filing a motion to dismiss under § 315.1.

[7] The first proceeding in Family Court following the filing of the petition is known as the initial appearance even if the juvenile has already been brought before the court immediately following his arrest. FCA § 320.2.

placed on two years' probation.[8] He had been detained pursuant to § 320.5(3)(b), between the initial appearance and the completion of the factfinding hearing, for a total of 15 days.

Appellees Luis Rosario and Kenneth Morgan, both age 14, were also ordered detained pending their factfinding hearings. Rosario was charged with attempted first-degree robbery and second-degree assault for an incident in which he, with four others, allegedly tried to rob two men, putting a gun to the head of one of them and beating both about the head with sticks. See Petitioners' Exhibit 2b. At the time of his initial appearance, on March 15, 1978, Rosario had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted.[9] Probable cause was found on March 21. On April 11, Rosario was released to his father, and the case was terminated without adjustment on September 25, 1978.

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[8] The "factfinding" is the juvenile's analogue of a trial. As in the earlier proceedings, the juvenile has a right to counsel at this hearing. § 341.2. See *In re Gault*, 387 U. S. 1 (1967). Evidence may be suppressed on the same grounds as in criminal cases, FCA § 330.2, and proof of guilt, based on the record evidence, must be beyond a reasonable doubt, § 342.2. See *In re Winship*, 397 U. S. 358 (1970). If guilt is established, the court enters an appropriate order and schedules a dispositional hearing. § 345.1.

The dispositional hearing is the final and most important proceeding in the Family Court. If the juvenile has committed a designated felony, the court must order a probation investigation and a diagnostic assessment. § 351.1. Any other material and relevant evidence may be offered by the probation agency or the juvenile. Both sides may call and cross-examine witnesses and recommend specific dispositional alternatives. § 350.4. The court must find, based on a preponderance of the evidence, § 350.3(2), that the juvenile is delinquent and requires supervision, treatment, or confinement. § 352.1. Otherwise, the petition is dismissed. *Ibid.*

If the juvenile is found to be delinquent, then the court enters an order of disposition. Possible alternatives include a conditional discharge; probation for up to two years; nonsecure placement with, perhaps, a relative or the Division for Youth; transfer to the Commissioner of Mental Health; or secure placement. §§ 353.1–353.5. Unless the juvenile committed one of the designated felonies, the court must order the least restrictive available alternative consistent with the needs and best interests of the juvenile and the need for protection of the community. § 352.2(2).

[9] Every accused juvenile is interviewed by a member of the staff of the Probation Department. This process is known as "probation intake." See

Kenneth Morgan was charged with attempted robbery and attempted grand larceny for an incident in which he and another boy allegedly tried to steal money from a 14-year-old girl and her brother by threatening to blow their heads off and grabbing them to search their pockets. See Petitioners' Exhibit 3b. Morgan, like Rosario, was on release status on another petition (for robbery and criminal possession of stolen property) at the time of his initial appearance on March 27, 1978. He had been arrested four previous times, and his mother refused to come to court because he had been in trouble so often she did not want him home. A probable-cause hearing was set for March 30, but was continued until April 4, when it was combined with a factfinding hearing. Morgan was found guilty of harassment and petit larceny and was ordered placed with the Department of Social Services for 18 months. He was detained a total of eight days between his initial appearance and the factfinding hearing.

On December 21, 1977, while still in preventive detention pending his factfinding hearing, Gregory Martin instituted a

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Testimony of Mr. Benjamin (Supervisor, New York Dept. of Probation), App. 142. In the course of the interview, which lasts an average of 45 minutes, the probation officer will gather what information he can about the nature of the case, the attitudes of the parties involved, and the child's past history and current family circumstances. *Id.*, at 144, 153. His sources of information are the child, his parent or guardian, the arresting officer, and any records of past contacts between the child and the Family Court. On the basis of this interview, the probation officer may attempt to "adjust," or informally resolve, the case. FCA § 308.1(2). Adjustment is a purely voluntary process in which the complaining witness agrees not to press the case further, while the juvenile is given a warning or agrees to counseling sessions or, perhaps, referral to a community agency. § 308.1 (Practice Commentary). In cases involving designated felonies or other serious crimes, adjustment is not permitted without written approval of the Family Court. § 308.1(4). If a case is not informally adjusted, it is referred to the "presentment agency." See n. 6, *supra*.

habeas corpus class action on behalf of "those persons who are, or during the pendency of this action will be, preventively detained pursuant to" § 320.5(3)(b) of the FCA. Rosario and Morgan were subsequently added as additional named plaintiffs. These three class representatives sought a declaratory judgment that § 320.5(3)(b) violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In an unpublished opinion, the District Court certified the class. App. 20–32.[10] The court also held that appellees were not required to exhaust their state remedies before resorting to federal habeas because the highest state court had already rejected an identical challenge to the juvenile preventive detention statute. See *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d 682, 350 N. E. 2d 906 (1976). Exhaustion of state remedies, therefore, would be "an exercise in futility." App. 26.

At trial, appellees offered in evidence the case histories of 34 members of the class, including the three named petitioners. Both parties presented some general statistics on the relation between pretrial detention and ultimate disposition. In addition, there was testimony concerning juvenile proceedings from a number of witnesses, including a legal aid attorney specializing in juvenile cases, a probation supervisor, a child psychologist, and a Family Court Judge. On the basis of this evidence, the District Court rejected the equal protection challenge as "insubstantial,"[11] but agreed with appellees that pretrial detention under the FCA violates due process.[12]

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[10] We have never decided whether Federal Rule of Civil Procedure 23, providing for class actions, is applicable to petitions for habeas corpus relief. See *Bell* v. *Wolfish*, 441 U. S. 520, 527, n. 6 (1979); *Middendorf* v. *Henry*, 425 U. S. 25, 30 (1976). Although appellants contested the class certification in the District Court, they did not raise the issue on appeal; nor do they urge it here. Again, therefore, we have no occasion to reach the question.

[11] The equal protection claim, which was neither raised on appeal nor decided by the Second Circuit, is not before us.

[12] The District Court gave three reasons for this conclusion. First, under the FCA, a juvenile may be held in pretrial detention for up to five

The court ordered that "all class members in custody pursuant to Family Court Act Section [320.5(3)(b)] shall be released forthwith." *Id.*, at 93.

The Court of Appeals affirmed. After reviewing the trial record, the court opined that "the vast majority of juveniles detained under [§ 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication." 689 F. 2d, at 369. The court concluded from that fact that § 320.5(3)(b) "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts." *Id.*, at 372. The early release of so many of those detained contradicts any asserted need for pretrial confinement to protect the community. The court therefore concluded that § 320.5(3)(b) must be declared unconstitutional as to all juveniles. Individual litigation would be a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.[13]

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days without any judicial determination of probable cause. Relying on *Gerstein* v. *Pugh*, 420 U. S., at 114, the District Court concluded that pretrial detention without a prior adjudication of probable cause is, itself, a *per se* violation of due process. *United States ex rel. Martin* v. *Strasburg*, 513 F. Supp. 691, 717 (SDNY 1981).

Second, after a review of the pertinent scholarly literature, the court noted that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime." *Id.*, at 708. *A fortiori*, the court concluded, a Family Court judge cannot make a reliable prediction based on the limited information available to him at the initial appearance. *Id.*, at 712. Moreover, the court felt that the trial record was "replete" with examples of arbitrary and capricious detentions. *Id.*, at 713.

Finally, the court concluded that preventive detention is merely a euphemism for punishment imposed without an adjudication of guilt. The alleged purpose of the detention—to protect society from the juvenile's criminal conduct—is indistinguishable from the purpose of post-trial detention. And given "the inability of trial judges to predict which juveniles will commit crimes," there is no rational connection between the decision to detain and the alleged purpose, even if that purpose were legitimate. *Id.*, at 716.

[13] Judge Newman concurred separately. He was not convinced that the record supported the majority's statistical conclusions. But he thought

II

There is no doubt that the Due Process Clause is applicable in juvenile proceedings. "The problem," we have stressed, "is to ascertain the precise impact of the due process requirement upon such proceedings." *In re Gault*, 387 U. S. 1, 13–14 (1967). We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. See *id.*, at 31–57 (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); *In re Winship*, 397 U. S. 358 (1970) (proof beyond a reasonable doubt); *Breed* v. *Jones*, 421 U. S. 519 (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, *e. g.*, *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971) (no right to jury trial). The State has "a *parens patriae* interest in preserving and promoting the welfare of the child," *Santosky* v. *Kramer*, 455 U. S. 745, 766 (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the "informality" and "flexibility" that characterize juvenile proceedings, *In re Winship*, *supra*, at 366, and yet to ensure that such proceedings comport with the "fundamental fairness" demanded by the Due Process Clause. *Breed* v. *Jones*, *supra*, at 531; *McKeiver*, *supra*, at 543 (plurality opinion).

The statutory provision at issue in these cases, § 320.5(3)(b), permits a brief pretrial detention based on a finding of a "serious risk" that an arrested juvenile may commit a crime before his return date. The question before us is whether preventive detention of juveniles pursuant to § 320.5(3)(b) is compatible with the "fundamental fairness" required by due process. Two separate inquiries are necessary to answer this question. First, does preventive detention under the

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that the statute was procedurally infirm because it granted unbridled discretion to Family Court judges to make an inherently uncertain prediction of future criminal behavior. 689 F. 2d, at 377.

New York statute serve a legitimate state objective? See *Bell* v. *Wolfish*, 441 U. S. 520, 534, n. 15 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963). And, second, are the procedural safeguards contained in the FCA adequate to authorize the pretrial detention of at least some juveniles charged with crimes? See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975).

A

Preventive detention under the FCA is purportedly designed to protect the child and society from the potential consequences of his criminal acts. *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 689–690, 350 N. E. 2d, at 910. When making any detention decision, the Family Court judge is specifically directed to consider the needs and best interests of the juvenile as well as the need for the protection of the community. FCA § 301.1; *In re Craig S.*, 57 App. Div. 2d 761, 394 N. Y. S. 2d 200 (1977). In *Bell* v. *Wolfish*, *supra*, at 534, n. 15, we left open the question whether any governmental objective other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention. As an initial matter, therefore, we must decide whether, in the context of the juvenile system, the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention.

The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. *De Veau* v. *Braisted*, 363 U. S. 144, 155 (1960). See also *Terry* v. *Ohio*, 392 U. S. 1, 22 (1968). We have stressed before that crime prevention is "a weighty social objective," *Brown* v. *Texas*, 443 U. S. 47, 52 (1979), and this interest persists undiluted in the juvenile context. See *In re Gault*, *supra*, at 20, n. 26. The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator.[14] And the harm to society generally may even be greater in this context given the high rate of recidivism among juveniles. *In re Gault, supra,* at 22.

The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. See *In re Gault, supra,* at 27. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. *Lehman* v. *Lycoming County Children's Services,* 458 U. S. 502, 510–511 (1982); *In re Gault, supra,* at 17. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* See *State* v. *Gleason,* 404 A. 2d 573, 580 (Me. 1979); *People ex rel. Wayburn* v. *Schupf, supra,* at 690, 350 N. E. 2d, at 910; *Baker* v. *Smith,* 477 S. W. 2d 149, 150–151 (Ky. App. 1971). In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child." *Santosky* v. *Kramer, supra,* at 766.

The New York Court of Appeals, in upholding the statute at issue here, stressed at some length "the desirability of protecting the juvenile from his own folly." *People ex rel. Wayburn* v. *Schupf, supra,* at 688–689, 350 N. E. 2d, at 909.[15]

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[14] In 1982, juveniles under 16 accounted for 7.5 percent of all arrests for violent crimes, 19.9 percent of all arrests for serious property crime, and 17.3 percent of all arrests for violent and serious property crimes combined. U. S. Dept. of Justice, Federal Bureau of Investigation, Crime in the United States 176–177 (1982) ("violent crimes" include murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault; "serious property crimes" include burglary, larceny-theft, motor vehicle theft, and arson).

[15] "Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is

Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child. See *L. O. W.* v. *District Court of Arapahoe*, 623 P. 2d 1253, 1258–1259 (Colo. 1981); *Morris* v. *D'Amario*, 416 A. 2d 137, 140 (R. I. 1980). See also *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"); *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979) (juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them").

The substantiality and legitimacy of the state interests underlying this statute are confirmed by the widespread use and judicial acceptance of preventive detention for juveniles. Every State, as well as the United States in the District of

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incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted. . . .

"For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult. . . . There is the element of gamesmanship and the excitement of 'getting away' with something and the powerful inducement of peer pressures. All of these commonly acknowledged factors make the commission of criminal conduct on the part of juveniles in general more likely than in the case of adults." *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 687–688, 350 N. E. 2d, at 908–909.

Columbia, permits preventive detention of juveniles accused of crime.[16] A number of model juvenile justice Acts also contain provisions permitting preventive detention.[17] And the courts of eight States, including the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, including pretrial crime. *L. O. W.* v. *District Court of Arapahoe, supra,* at 1258–1259; *Morris* v. *D'Amario, supra,* at 139–140; *State* v. *Gleason,* 404 A. 2d, at 583; *Pauley* v. *Gross,* 1 Kan. App. 2d 736, 738–740, 574 P. 2d 234, 237–238 (1977); *People ex rel. Wayburn* v. *Schupf,* 39 N. Y. 2d, at 688–689, 350 N. E. 2d, at 909–910; *Aubrey* v. *Gadbois,* 50 Cal. App. 3d 470, 472, 123 Cal. Rptr. 365, 366 (1975); *Baker* v. *Smith,* 477 S. W. 2d, at 150–151; *Commonwealth ex rel. Sprowal* v. *Hendrick,* 438 Pa. 435, 438–439, 265 A. 2d 348, 349–350 (1970).

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[16] Ala. Code § 12–15–59 (1975); Alaska Stat. Ann. § 47.10.140 (1979); Rule 3, Ariz. Juv. Ct. Rules of Proc., Ariz. Rev. Stat. Ann. (Supp. 1983–1984 to vol. 17A); Ark. Stat. Ann. § 45–421 (Supp. 1983); Cal. Welf. & Inst. Code Ann. § 628 (West Supp. 1984); Colo. Rev. Stat. § 19–2–102 (Supp. 1983); Conn. Gen. Stat. § 46b–131 (Supp. 1984); Del. Fam. Ct. Rule 60 (1981); D. C. Code § 16–2310 (1981); Fla. Stat. § 39.032 (Supp. 1984); Ga. Code Ann. § 15–11–19 (1982); Haw. Rev. Stat. § 571–31.1 (Supp. 1984); Idaho Code § 16–1811 (Supp. 1983); Ill. Rev. Stat., ch. 37, § 703–4 (1983); Ind. Code § 31–6–4–5 (1982); Iowa Code § 232.22 (1983); Kan. Stat. Ann. § 38–1632 (Supp. 1983); Ky. Rev. Stat. § 208.192 (1982); La. Code Juv. Proc. Ann., Art. 40 (West 1983 Pamphlet); Me. Rev. Stat. Ann., Tit. 15, § 3203 (1964 and Supp. 1983–1984); Md. Cts. & Jud. Proc. Code Ann. § 3–815 (1984); Mass. Gen. Laws Ann., ch. 119, § 66 (West Supp. 1983–1984); Mich. Comp. Laws § 712A.15 (1979); Minn. Stat. § 260.171 (1982); Miss. Code Ann. § 43–23–11 (1972); Mo. Juv. Ct. Rule 111.02 (1981); Mont. Code Ann. § 41–5–305 (1983); Neb. Rev. Stat. § 43–255 (Supp. 1982); Nev. Rev. Stat. § 62.140 (1983); N. H. Rev. Stat. Ann. § 169B:14 (Supp. 1983); N. J. Stat. Ann. § 2A:4–56 (Supp. 1983–1984); N. M. Stat. Ann. § 32–1–24 (1981); N. Y. FCA § 320.5(3) (McKinney 1983); N. C. Gen. Stat. § 7A–574 (Supp. 1983); N. D. Cent. Code § 27–20–14 (1974); Ohio Rev. Code Ann. § 2151.311 (1976); Okla. Stat., Tit. 10, § 1107 (Supp. 1983); Ore. Rev. Stat. § 419.573 (1983); 42 Pa. Cons. Stat. § 6325 (1982); R. I. Gen. Laws §§ 14–1–20, 14–1–21 (1981); S. C. Code § 20–7–600 (Supp. 1983); S. D. Codified Laws § 26–8–19.2 (Supp. 1983); Tenn. Code Ann. § 37–1–114 (1984); Tex. Fam. Code Ann. § 53.02 (1975 and Supp. 1984); Utah Code Ann. § 78–3a–30 (Supp. 1983); Vt. Stat. Ann., Tit. 33, § 643 (1981); Va. Code § 16.1–248 (1982); Wash. Rev. Code § 13.40.040 (1983); W. Va. Code § 49–5–8 (Supp. 1983); Wis. Stat. § 48.208 (1981–1982); Wyo. Stat. § 14–6–206 (1977).

[17] See U. S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice, Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention 294–296 (July 1980); Uniform Juvenile Court Act § 14, 9A U. L. A. 22 (1979); Standard Juvenile Court Act, Art. IV, § 16, proposed by the National Council on Crime and Delinquency (1959); W. Sheridan, Legislative Guide for Drafting Family and Juvenile Court Acts § 20(a)(1) (Dept. of HEW, Children's Bureau, Pub. No. 472–1969); see also Standards for Juvenile and Family Courts 62–63 (Dept. of HEW, Children's Bureau,

"The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934)." *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952). In light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings. Cf. *McKeiver* v. *Pennsylvania,* 403 U. S., at 548 (plurality opinion).[18]

Pub. No. 437-1966). Cf. Institute of Judicial Administration/American Bar Association Project on Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition § 3.2(B) (Tent. Draft 1977) (detention limited to "reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim").

[18] Appellees argue that some limit must be placed on the categories of crimes that detained juveniles must be accused of having committed or being likely to commit. But the discretion to delimit the categories of

Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished." *Bell* v. *Wolfish*, 441 U. S., at 535, n. 16. Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under § 320.5(3)(b) are in fact compatible with those purposes. *Kennedy* v. *Mendoza-Martinez*, 372 U. S., at 168–169. "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell* v. *Wolfish*, *supra*, at 538. Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–189. See *Bell* v. *Wolfish*, *supra*, at 538; *Flemming* v. *Nestor*, 363 U. S. 603, 613–614 (1960).

There is no indication in the statute itself that preventive detention is used or intended as a punishment. First of all, the detention is strictly limited in time. If a juvenile is detained at his initial appearance and has denied the charges

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crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures. *Whalen* v. *United States*, 445 U. S. 684, 689 (1980); *Rochin* v. *California*, 342 U. S. 165, 168 (1952). See also *Rummel* v. *Estelle*, 445 U. S. 263, 275 (1980) ("the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime").

More fundamentally, this sort of attack on a criminal statute must be made on a case-by-case basis. *United States* v. *Raines*, 362 U. S. 17, 21 (1960). The Court will not sift through the entire class to determine whether the statute was constitutionally applied in each case. And, outside the limited First Amendment context, a criminal statute may not be attacked as overbroad. See *New York* v. *Ferber*, 458 U. S. 747 (1982).

against him, he is entitled to a probable-cause hearing to be held not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner. FCA § 325.1(2).[19] If the Family Court judge finds probable cause, he must also determine whether continued detention is necessary pursuant to § 320.5(3)(b). § 325.3(3).

Detained juveniles are also entitled to an expedited factfinding hearing. If the juvenile is charged with one of a limited number of designated felonies, the factfinding hearing must be scheduled to commence not more than 14 days after the conclusion of the initial appearance. § 340.1. If the juvenile is charged with a lesser offense, then the factfinding hearing must be held not more than three days after the initial appearance.[20] In the latter case, since the times for the probable-cause hearing and the factfinding hearing coincide, the two hearings are merged.

Thus, the maximum possible detention under § 320.5(3)(b) of a youth accused of a serious crime, assuming a 3-day extension of the factfinding hearing for good cause shown, is 17 days. The maximum detention for less serious crimes, again assuming a 3-day extension for good cause shown, is six days. These time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case.

The conditions of confinement also appear to reflect the regulatory purposes relied upon by the State. When a juvenile is remanded after his initial appearance, he cannot, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals. FCA

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[19] For good cause shown, the court may adjourn the hearing, but for no more than three additional court days. FCA § 325.1(3).

[20] In either case, the court may adjourn the hearing for not more than three days for good cause shown. FCA § 340.1(3). The court must state on the record the reason for any adjournment. § 340.1(4).

§ 304.1(2). Instead, the child is screened by an "assessment unit" of the Department of Juvenile Justice. Testimony of Mr. Kelly (Deputy Commissioner of Operations, New York City Department of Juvenile Justice), App. 286–287. The assessment unit places the child in either nonsecure or secure detention. Nonsecure detention involves an open facility in the community, a sort of "halfway house," without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities. *Id.*, at 285; Testimony of Mr. Benjamin, *id.*, at 149–150.

Secure detention is more restrictive, but it is still consistent with the regulatory and *parens patriae* objectives relied upon by the State. Children are assigned to separate dorms based on age, size, and behavior. They wear street clothes provided by the institution and partake in educational and recreational programs and counseling sessions run by trained social workers. Misbehavior is punished by confinement to one's room. See Testimony of Mr. Kelly, *id.*, at 292–297. We cannot conclude from this record that the controlled environment briefly imposed by the State on juveniles in secure pretrial detention "is imposed for the purpose of punishment" rather than as "an incident of some other legitimate governmental purpose." *Bell* v. *Wolfish*, 441 U. S., at 538.

The Court of Appeals, of course, did conclude that the underlying purpose of § 320.5(3)(b) is punitive rather than regulatory. But the court did not dispute that preventive detention might serve legitimate regulatory purposes or that the terms and conditions of pretrial confinement in New York are compatible with those purposes. Rather, the court invalidated a significant aspect of New York's juvenile justice system based solely on some case histories and a statistical study which appeared to show that "the vast majority of juveniles detained under [§ 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication." 689 F. 2d, at 369. The court assumed that dismissal of a petition or failure to confine a juvenile at the dispositional hearing belied the need to detain him prior to factfinding and that, therefore, the pretrial detention constituted punishment. *Id.*, at 373. Since punishment imposed without a prior adjudication of guilt is *per se* illegitimate, the Court of Appeals concluded that no juveniles could be held pursuant to § 320.5(3)(b).

There are some obvious flaws in the statistics and case histories relied upon by the lower court.[21] But even assuming it to be the case that "by far the greater number of juveniles incarcerated under [§ 320.5(3)(b)] will never be confined as a consequence of a disposition imposed after an adjudication of delinquency," 689 F. 2d, at 371–372, we find that to be an insufficient ground for upsetting the widely shared legislative judgment that preventive detention serves an important and legitimate function in the juvenile justice system. We are unpersuaded by the Court of Appeals' rather cavalier equation of detentions that do not lead to continued confinement after an adjudication of guilt and "wrongful" or "punitive" pretrial detentions.

Pretrial detention need not be considered punitive merely because a juvenile is subsequently discharged subject to conditions or put on probation. In fact, such actions reinforce the original finding that close supervision of the juvenile is required. Lenient but supervised disposition is in keeping with the Act's purpose to promote the welfare and development of the child.[22] As the New York Court of Appeals noted:

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[21] For example, as the Court of Appeals itself admits, 689 F. 2d, at 369, n. 18, the statistical study on which it relied mingles indiscriminately detentions under § 320.5(3)(b) with detentions under § 320.5(3)(a). The latter provision applies only to juveniles who are likely not to appear on the return date if not detained, and appellees concede that such juveniles may be lawfully detained. Brief for Appellees 93. Furthermore, the 34 case histories on which the court relied were handpicked by appellees' counsel from over a 3-year period. Compare Petitioners' Exhibit 19a (detention of Geraldo Delgado on March 5, 1976) with Petitioners' Exhibit 35a (detention of James Ancrum on August 19, 1979). The Court of Appeals stated that appellants did not contest the representativeness of these case histories. 689 F. 2d, at 369, n. 19. Appellants argue, however, that there was no occasion to contest their representativeness because the case histories were not even offered by appellees as a representative sample, and were not evaluated by appellees' expert statistician or the District Court in that light. See Brief for Appellant in No. 82–1278, pp. 24–25, n.**. We need not resolve this controversy.

> "It should surprise no one that caution and concern for both the juvenile and society may indicate the more conservative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement may not be indicated." *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 690, 350 N. E. 2d, at 910.

Even when a case is terminated prior to factfinding, it does not follow that the decision to detain the juvenile pursuant to § 320.5(3)(b) amounted to a due process violation. A delinquency petition may be dismissed for any number of reasons collateral to its merits, such as the failure of a witness to testify. The Family Court judge cannot be expected to anticipate such developments at the initial hearing. He makes his decision based on the information available to him at that time, and the propriety of the decision must be judged in that light. Consequently, the final disposition of a case is "largely irrelevant" to the legality of a pretrial detention. *Baker* v. *McCollan*, 443 U. S. 137, 145 (1979).

It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis. Section 320.5(3)(b) is not invalid "on its face" by reason of the ambiguous statistics and case histories relied upon by the court below.[23] We find no justification for the conclusion that, contrary to the express language of the statute and the judgment of the highest state court, § 320.5(3)(b) is a punitive rather than a regulatory measure. Preventive detention under the FCA serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime.

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[22] Judge Quinones testified that detention at disposition is considered a "harsh solution." At the dispositional hearing, the Family Court judge usually has "a much more complete picture of the youngster" and tries to tailor the least restrictive dispositional order compatible with that picture. Testimony of Judge Quinones, App. 279–281.

B

Given the legitimacy of the State's interest in preventive detention, and the nonpunitive nature of that detention, the remaining question is whether the procedures afforded juveniles detained prior to factfinding provide sufficient protection against erroneous and unnecessary deprivations of liberty. See *Mathews* v. *Eldridge*, 424 U. S., at 335.[24] In *Gerstein* v. *Pugh*, 420 U. S., at 114, we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. We did not, however, mandate a specific timetable. Nor did we require the "full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.*, at 119. Instead, we recognized "the desirability of flexibility and experimentation by the States." *Id.*, at 123. *Gerstein* arose under the Fourth Amendment, but the same concern with "flexibility" and "informality," while yet ensuring adequate predetention procedures, is present in this context. *In re Winship*, 397 U. S., at 366; *Kent* v. *United States*, 383 U. S. 541, 554 (1966).

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[23] Several *amici* argue that similar statistics obtain throughout the country. See, *e. g.*, Brief for American Bar Association as *Amicus Curiae* 23; Brief for Association for Children of New Jersey as *Amicus Curiae* 8, 11; Brief for Youth Law Center et al. as *Amici Curiae* 13–14. But even if New York's experience were duplicated on a national scale, that fact would not lead us, as *amici* urge, to conclude that every State and the United States are illicitly punishing juveniles prior to their trial. On the contrary, if such statistics obtain nationwide, our conclusion is strengthened that the existence of the statistics in these cases is not a sufficient ground for striking down New York's statute. As already noted: "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)." *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952).

[24] Appellees urge the alleged lack of procedural safeguards as an alternative ground for upholding the judgment of the Court of Appeals. Brief for Appellees 62–75. The court itself intimated that it would reach the same result on that ground, 689 F. 2d, at 373–374, and Judge Newman, in his concurrence, relied expressly on perceived procedural flaws in the statute. Accordingly, we deem it necessary to consider the question.

In many respects, the FCA provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*. The initial appearance is informal, but the accused juvenile is given full notice of the charges against him and a complete stenographic record is kept of the hearing. See 513 F. Supp., at 702. The juvenile appears accompanied by his parent or guardian.[25] He is first informed of his rights, including the right to remain silent and the right to be represented by counsel chosen by him or by a law guardian assigned by the court. FCA § 320.3. The initial appearance may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an appointed law guardian or other counsel to appear before the court. § 320.2(3). When his counsel is present, the juvenile is informed of the charges against him and furnished with a copy of the delinquency petition. § 320.4(1). A representative from the presentment agency appears in support of the petition.

The nonhearsay allegations in the delinquency petition and supporting depositions must establish probable cause to believe the juvenile committed the offense. Although the Family Court judge is not required to make a finding of probable cause at the initial appearance, the youth may challenge the sufficiency of the petition on that ground. FCA § 315.1. Thus, the juvenile may oppose any recommended detention by arguing that there is not probable cause to believe he committed the offense or offenses with which he is charged. If the petition is not dismissed, the juvenile is given an opportunity to admit or deny the charges. § 321.1.[26]

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[25] If the juvenile's parent or guardian fails to appear after reasonable and substantial efforts have been made to notify such person, the court must appoint a law guardian for the child. FCA § 320.3.

At the conclusion of the initial appearance, the presentment agency makes a recommendation regarding detention. A probation officer reports on the juvenile's record, including other prior and current Family Court and probation contacts, as well as relevant information concerning home life, school attendance, and any special medical or developmental problems. He concludes by offering his agency's recommendation on detention. Opposing counsel, the juvenile's parents, and the juvenile himself may all speak on his behalf and challenge any information or recommendation. If the judge does decide to detain the juvenile under § 320.5(3)(b), he must state on the record the facts and reasons for the detention.[27]

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[26] If the child chooses to remain silent, he is assumed to deny the charges. FCA § 321.1. With the consent of the court and of the presentment agency, the child may admit to a lesser charge. If he wishes to admit to the charges or to a lesser charge, the court must, before accepting the admission, advise the child of his right to a factfinding hearing and of the possible specific dispositional orders that may result from the admission. *Ibid.* The court must also satisfy itself that the child actually did commit the acts to which he admits. *Ibid.*

With the consent of the victim or complainant and the juvenile, the court may also refer a case to the probation service for adjustment. If the case is subsequently adjusted, the petition is then dismissed. § 320.6.

[27] Given that under *Gerstein*, 420 U. S., at 119–123, a probable-cause hearing may be informal and nonadversarial, a Family Court judge could make a finding of probable cause at the initial appearance. That he is not required to do so does not, under the circumstances, amount to a deprivation of due process. Appellees fail to point to a single example where probable cause was not found after a decision was made to detain the child.

As noted, a detained juvenile is entitled to a formal, adversarial probable-cause hearing within three days of his initial appearance, with one 3-day extension possible for good cause shown.[28] The burden at this hearing is on the presentment agency to call witnesses and offer evidence in support of the charges. § 325.2. Testimony is under oath and subject to cross-examination. *Ibid.* The accused juvenile may call witnesses and offer evidence in his own behalf. If the court finds probable cause, the court must again decide whether continued detention is necessary under § 320.5(3)(b). Again, the facts and reasons for the detention must be stated on the record.

In sum, notice, a hearing, and a statement of facts and reasons are given prior to any detention under § 320.5(3)(b). A formal probable-cause hearing is then held within a short while thereafter, if the factfinding hearing is not itself scheduled within three days. These flexible procedures have been found constitutionally adequate under the Fourth Amendment, see *Gerstein* v. *Pugh*, and under the Due Process Clause, see *Kent* v. *United States*, *supra*, at 557. Appellees have failed to note any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes.[29]

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[28] The Court in *Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention. *Id.*, at 124, n. 25. The brief delay in the probable-cause hearing may actually work to the advantage of the juvenile since it gives his counsel, usually appointed at the initial appearance pursuant to FCA § 320.2(2), time to prepare.

[29] Judge Newman, in his concurrence below, offered a list of statutory improvements. These suggested changes included: limitations on the crimes for which the juvenile has been arrested or which he is likely to commit if released; a determination of the likelihood that the juvenile committed the crime; an assessment of the juvenile's background; and a more specific standard of proof. The first and second of these suggestions have already been considered. See nn. 18 and 27, *supra*. We need only add to

Appellees argue, however, that the risk of erroneous and unnecessary detentions is too high despite these procedures because the standard for detention is fatally vague. Detention under § 320.5(3)(b) is based on a finding that there is a "serious risk" that the juvenile, if released, would commit a crime prior to his next court appearence. We have already seen that detention of juveniles on that ground serves legitimate regulatory purposes. But appellees claim, and the District Court agreed, that it is virtually impossible to predict future criminal conduct with any degree of accuracy. Moreover, they say, the statutory standard fails to channel the discretion of the Family Court judge by specifying the factors on which he should rely in making that prediction. The procedural protections noted above are thus, in their view, unavailing because the ultimate decision is intrinsically arbitrary and uncontrolled.

Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions,[30] and we have specifically re-

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the discussion in n. 18 that there is no indication that delimiting the category of crimes justifying detention would improve the accuracy of the § 320.5(3)(b) determination in any respect. The third and fourth suggestions are discussed in text, *infra*.

[30] See *Jurek* v. *Texas*, 428 U. S. 262, 274–275 (1976) (death sentence imposed by jury); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 9–10 (1979) (grant of parole); *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972) (parole revocation).

A prediction of future criminal conduct may also form the basis for an increased sentence under the "dangerous special offender" statute, 18 U. S. C. § 3575. Under § 3575(f), a "dangerous" offender is defined as an individual for whom "a period of confinement longer than that provided for such [underlying] felony is required for the protection of the public from further criminal conduct by the defendant." The statute has been challenged numerous times on the grounds that the standard is unconstitutionally vague. Every Court of Appeals considering the question has rejected that claim. *United States* v. *Davis*, 710 F. 2d 104, 108–109 (CA3), cert. denied, 464 U. S. 1001 (1983); *United States* v. *Schell*, 692 F. 2d 672, jected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless." *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., concurring in judgment).

We have also recognized that a prediction of future criminal conduct is "an experienced prediction based on a host of variables" which cannot be readily codified. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 16 (1979). Judge Quinones of the Family Court testified at trial that he and his colleagues make a determination under § 320.5(3)(b) based on numerous factors including the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and any special circumstances that might be brought to his attention by the probation officer, the child's attorney, or any parents, relatives, or other responsible persons accompanying the child. Testimony of Judge Quinones, App. 254–267. The decision is based on as much information as can reasonably be obtained at the initial appearance. *Ibid.*

Given the right to a hearing, to counsel, and to a statement of reasons, there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute. As the New York Court of Appeals concluded, *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 690, 350 N. E. 2d, at 910, "to a very real extent Family Court must exercise a substitute parental control for which there can be

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675–676 (CA10 1982); *United States* v. *Williamson*, 567 F. 2d 610, 613 (CA4 1977); *United States* v. *Bowdach*, 561 F. 2d 1160, 1175 (CA5 1977); *United States* v. *Neary*, 552 F. 2d 1184, 1194 (CA7), cert. denied, 434 U. S. 864 (1977); *United States* v. *Stewart*, 531 F. 2d 326, 336–337 (CA6), cert. denied, 426 U. S. 922 (1976).

no particularized criteria." There is also no reason, we should add, for a federal court to assume that a state court judge will not strive to apply state law as conscientiously as possible. *Sumner* v. *Mata*, 449 U. S. 539, 549 (1981).

It is worth adding that the Court of Appeals for the Second Circuit was mistaken in its conclusion that "[i]ndividual litigation . . . is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined." 689 F. 2d, at 373. In fact, one of the juveniles in the very case histories upon which the court relied was released from pretrial detention on a writ of habeas corpus issued by the State Supreme Court. New York courts also have adopted a liberal view of the doctrine of "capable of repetition, yet evading review" precisely in order to ensure that pretrial detention orders are not unreviewable. In *People ex rel. Wayburn* v. *Schupf*, *supra*, at 686, 350 N. E. 2d, at 908, the court declined to dismiss an appeal from the grant of a writ of habeas corpus despite the technical mootness of the case.

> "Because the situation is likely to recur . . . and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal might be prosecuted, fact-finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us), . . . we decline to dismiss [the appeal] on the ground of mootness."

The required statement of facts and reasons justifying the detention and the stenographic record of the initial appearance will provide a basis for the review of individual cases. Pretrial detention orders in New York may be reviewed by writ of habeas corpus brought in State Supreme Court. And the judgment of that court is appealable as of right and may be taken directly to the Court of Appeals if a constitutional question is presented. N. Y. Civ. Prac. Law § 5601(b)(2)

(McKinney 1978). Permissive appeal from a Family Court order may also be had to the Appellate Division. FCA § 365.2. Or a motion for reconsideration may be directed to the Family Court judge. § 355.1(1)(b). These post-detention procedures provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detentions ordered under § 320.5(3). Such procedures may well flesh out the standards specified in the statute.

III

The dissent would apparently have us strike down New York's preventive detention statute on two grounds: first, because the preventive detention of juveniles constitutes poor public policy, with the balance of harms outweighing any positive benefits either to society or to the juveniles themselves, *post*, at 290–291, 308, and, second, because the statute could have been better drafted to improve the quality of the decisionmaking process, *post*, at 304–306. But it is worth recalling that we are neither a legislature charged with formulating public policy nor an American Bar Association committee charged with drafting a model statute. The question before us today is solely whether the preventive detention system chosen by the State of New York and applied by the New York Family Court comports with constitutional standards. Given the regulatory purpose for the detention and the procedural protections that precede its imposition, we conclude that § 320.5(3)(b) of the New York FCA is not invalid under the Due Process Clause of the Fourteenth Amendment.

The judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The New York Family Court Act governs the treatment of persons between 7 and 16 years of age who are alleged to have committed acts that, if committed by adults, would constitute crimes.[1] The Act contains two provisions that authorize the detention of juveniles arrested for offenses covered by the Act[2] for up to 17 days pending adjudication of their guilt.[3] Section 320.5(3)(a) empowers a judge of the New York Family Court to order detention of a juvenile if he finds "there is a substantial probability that [the juvenile] will not appear in court on the return date." Section 320.5(3)(b), the provision at issue in these cases, authorizes detention if the judge finds "there is a serious risk [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime."[4]

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[1] N. Y. Jud. Law §§ 301.2(1), 302.1(1) (McKinney 1983) (hereinafter Family Court Act or FCA). Children aged 13 or over accused of murder and children aged 14 or over accused of kidnaping, arson, rape, or a few other serious crimes are exempted from the coverage of the Act and instead are prosecuted as "juvenile offenders" in the adult criminal courts. N. Y. Penal Law §§ 10.00(18), 30.00(2) (McKinney Supp. 1983–1984). For the sake of simplicity, offenses covered by the Family Court Act, as well as the more serious offenses enumerated above, hereinafter will be referred to generically as crimes.

[2] Ironically, juveniles arrested for very serious offenses, see n. 1, *supra*, are not subject to preventive detention under this or any other provision.

[3] Strictly speaking, "guilt" is never adjudicated under the Act; nor is the juvenile ever given a trial. Rather, whether the juvenile committed the offense is ascertained in a "factfinding hearing." In most respects, however, such a hearing is the functional equivalent of an ordinary criminal trial. For example, the juvenile is entitled to counsel and the State bears the burden of demonstrating beyond a reasonable doubt that the juvenile committed the offense of which he is accused. See FCA §§ 341.2(1), 342.2(2); cf. *In re Winship*, 397 U. S. 358 (1970); *In re Gault*, 387 U. S. 1 (1967) (establishing constitutional limitations on the form of such proceedings in recognition of the severity of their impact upon juveniles). For convenience, the ensuing discussion will use the terminology associated with adult criminal proceedings when describing the treatment of juveniles in New York.

[4] At the time appellees first brought their suit, the pertinent portions of FCA § 320.5(3) were embodied in FCA § 739(a). I agree with the majority that the reenactment of the crucial provision under a different numerical heading does not render the case moot. See *ante*, at 256, n. 2.

There are few limitations on § 320.5(3)(b). Detention need not be predicated on a finding that there is probable cause to believe the child committed the offense for which he was arrested. The provision applies to all juveniles, regardless of their prior records or the severity of the offenses of which they are accused. The provision is not limited to the prevention of dangerous crimes; a prediction that a juvenile if released may commit a minor misdemeanor is sufficient to justify his detention. Aside from the reference to "serious risk," the requisite likelihood that the juvenile will misbehave before his trial is not specified by the statute.

The Court today holds that preventive detention of a juvenile pursuant to § 320.5(3)(b) does not violate the Due Process Clause. Two rulings are essential to the Court's decision: that the provision promotes legitimate government objectives important enough to justify the abridgment of the detained juveniles' liberty interests, *ante*, at 274; and that the provision incorporates procedural safeguards sufficient to prevent unnecessary or arbitrary impairment of constitutionally protected rights, *ante*, at 277, 279–280. Because I disagree with both of those rulings, I dissent.

I

The District Court made detailed findings, which the Court of Appeals left undisturbed, regarding the manner in which § 320.5(3)(b) is applied in practice. Unless clearly erroneous, those findings are binding upon us, see Fed. Rule Civ. Proc. 52(a), and must guide our analysis of the constitutional questions presented by these cases.

The first step in the process that leads to detention under § 320.5(3)(b) is known as "probation intake." A juvenile may arrive at intake by one of three routes: he may be brought there directly by an arresting officer; he may be detained for a brief period after his arrest and then taken to intake; he may be released upon arrest and directed to appear at a designated time. *United States ex rel. Martin* v. *Strasburg*, 513 F. Supp. 691, 701 (SDNY 1981). The heart of the intake procedure is a 10-to-40-minute interview of the juvenile, the arresting officer, and sometimes the juvenile's parent or guardian. The objectives of the probation officer conducting the interview are to determine the nature of the offense the child may have committed and to obtain some background information on him. *Ibid.*

On the basis of the information derived from the interview and from an examination of the juvenile's record, the probation officer decides whether the case should be disposed of informally ("adjusted") or whether it should be referred to the Family Court. If the latter, the officer makes an additional recommendation regarding whether the juvenile should be detained. "There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole . . . ." *Ibid.*

The actual decision whether to detain a juvenile under § 320.5(3)(b) is made by a Family Court judge at what is called an "initial appearance"—a brief hearing resembling an arraignment.[5] *Id.*, at 702. The information on which the judge makes his determination is very limited. He has before him a "petition for delinquency" prepared by a state agency, charging the juvenile with an offense, accompanied with one or more affidavits attesting to the juvenile's involvement. Ordinarily the judge has in addition the written report and recommendation of the probation officer. However, the probation officer who prepared the report rarely attends the hearing. *Ibid.* Nor is the complainant likely to appear. Consequently, "[o]ften there is no one present with personal knowledge of what happened." *Ibid.*

In the typical case, the judge appoints counsel for the juvenile at the time his case is called. Thus, the lawyer has no opportunity to make an independent inquiry into the juvenile's background or character, and has only a few minutes to prepare arguments on the child's behalf. *Id.*, at 702, 708. The judge ordinarily does not interview the juvenile, *id.*, at 708, makes no inquiry into the truth of allegations in the petition, *id.*, at 702, and does not determine whether there is probable cause to believe the juvenile committed the offense.[6] The typical hearing lasts between 5 and 15 minutes, and the judge renders his decision immediately afterward. *Ibid.*

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[5] If the juvenile is detained upon arrest, this hearing must be held on the next court day or within 72 hours, whichever comes first. FCA § 307.3(4).

Neither the statute nor any other body of rules guides the efforts of the judge to determine whether a given juvenile is likely to commit a crime before his trial. In making detention decisions, "each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute." *Ibid.* Family Court judges are not provided information regarding the behavior of juveniles over whose cases they have presided, so a judge has no way of refining the standards he employs in making detention decisions. *Id.*, at 712.

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[6] The majority admits that "the Family Court judge is not required to make a finding of probable cause at the initial appearance," but contends that the juvenile has the option to challenge the sufficiency of the petition for delinquency on the ground that it fails to establish probable cause. *Ante*, at 276. None of the courts that have considered the constitutionality of New York's preventive-detention system has suggested that a juvenile has a statutory right to a probable-cause determination before he is detained. The provisions cited by the majority for its novel reading of the statute provide only shaky support for its contention. FCA § 315.1, which empowers the juvenile to move to dismiss a petition lacking allegations sufficient to satisfy § 311.2, provides that "[a] motion to dismiss under this section must be made within the time provided for in section 332.2." Section 332.2, in turn, provides that pretrial motions shall be made within 30 days *after* the initial appearance and before the factfinding hearing. If the juvenile has been detained, the judge is instructed to "hear and determine pre-trial motions on an expedited basis," § 332.2(4), but is not required to rule upon such motions peremptorily. In sum, the statutory scheme seems to contemplate that a motion to dismiss a petition for lack of probable cause, accompanied with "supporting affidavits, exhibits and memoranda of law," § 332.2(2), would be filed sometime after the juvenile is detained under § 320.5(3)(b). And there is no reason to expect that the ruling on such a motion would be rendered before the juvenile would in any event be entitled to a probable-cause hearing under § 325.1(2). That counsel for a juvenile ordinarily is not even appointed until a few minutes prior to the initial appearance, see *supra*, at 284 and this page, confirms this interpretation. The lesson of this foray into the tangled provisions of the New York Family Court Act is that the majority ought to adhere to our usual policy of relying whenever possible for interpretation of a state statute upon courts better acquainted with its terms and applications.

After examining a study of a sample of 34 cases in which juveniles were detained under § 320.5(3)(b)[7] along with various statistical studies of pretrial detention of juveniles in New York,[8] the District Court made findings regarding the circumstances in which the provision habitually is invoked. Three of those findings are especially germane to appellees' challenge to the statute. First, a substantial number of "first offenders" are detained pursuant to § 320.5(3)(b). For example, at least 5 of the 34 juveniles in the sample had no prior contact with the Family Court before being detained and at least 16 had no prior adjudications of delinquency. *Id.*, at 695–700.[9] Second, many juveniles are released—for periods ranging from five days to several weeks—after their arrests and are then detained under § 320.5(3)(b), despite the absence of any evidence of misconduct during the time between their arrests and "initial appearances." Sixteen of the thirty-four cases in the sample fit this pattern. *Id.*, at 705, 713–714. Third, "the overwhelming majority" of the juveniles detained under § 320.5(3)(b) are released either before or immediately after their trials, either unconditionally or on parole. *Id.*, at 705. At least 23 of the juveniles in the sample fell into this category. *Martin* v. *Strasburg*, 689 F. 2d 365, 369, n. 19 (CA2 1982); see 513 F. Supp., at 695–700.

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[7] The majority refuses to consider the circumstances of these 34 cases, dismissing them as unrepresentative, *ante*, at 272, n. 21, and focuses instead on the lurid facts associated with the cases of the three named appellees. I cannot agree that the sample is entitled to so little weight. There was uncontested testimony at trial to the effect that the 34 cases were typical. App. 128 (testimony of Steven Hiltz, an attorney with 8½ years of experience before the Family Court). At no point in this litigation have appellants offered an alternative selection of instances in which § 320.5(3)(b) has been invoked. And most importantly, despite the fact that the District Court relied heavily on the sample when assessing the manner in which the statute is applied, see 513 F. Supp., at 695–700, appellants did not dispute before the Court of Appeals the representativeness of the 34 cases, see *Martin* v. *Strasburg*, 689 F. 2d 365, 369, n. 19 (CA2 1982). When the defendants in a plaintiff class action challenge on appeal neither the certification of the class, see *ante*, at 261, n. 10, nor the plaintiffs' depiction of the character of the class, we ought to analyze the case as it comes to us and not try to construct a new version of the facts on the basis of an independent and selective review of the record.

[8] As the Court of Appeals acknowledged, 689 F. 2d, at 369, n. 18, there are defects in all of the available statistical studies. Most importantly, none of the studies distinguishes persons detained under § 320.5(3)(a) from persons detained under § 320.5(3)(b). However, these flaws did not disable the courts below from making meaningful—albeit rough—generalizations regarding the incidence of detention under the latter provision. Especially when conjoined with the sample of 34 cases submitted by appellees, see n. 7, *supra*, the studies are sufficient to support the three findings enumerated in the text. Even the majority, though it chastises appellees for failing to assemble better data, *ante*, at 272, and n. 21, does not suggest that those findings are clearly erroneous.

Finally, the District Court made a few significant findings concerning the conditions associated with "secure detention" pursuant to § 320.5(3)(b).[10] In a "secure facility," "[t]he juveniles are subjected to strip-searches, wear institutional clothing and follow institutional regimen. At Spofford [Juvenile Detention Center], which is a secure facility, some juveniles who have had dispositional determinations and were awaiting placement (long term care) commingle with those in pretrial detention (short term care)." *Id.*, at 695, n. 5.

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[9] The figures in the text are taken from the District Court's summary of the 34 cases in the sample. Review of the transcripts of the hearings in those cases reveals the actual number to be 9 and 23, respectively. See Petitioners' Exhibits 6a, 11a, 12a, 14a, 15a, 16a, 19a, 24a, 35a.

[10] The state director of detention services testified that, in 1978, approximately six times as many juveniles were admitted to "secure facilities" as to "non-secure facilities." See 513 F. Supp., at 703, n. 8. These figures are not broken down as to persons detained under § 320.5(3)(a) and persons detained under § 320.5(3)(b). There seems no dispute, however, that most of the juveniles held under the latter provision are subjected to "secure detention."

It is against the backdrop of these findings that the contentions of the parties must be examined.

II

A

As the majority concedes, *ante*, at 263, the fact that § 320.5(3)(b) applies only to juveniles does not insulate the provision from review under the Due Process Clause. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U. S. 1, 13 (1967). Examination of the provision must of course be informed by a recognition that juveniles have different needs and capacities than adults, see *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 550 (1971), but the provision still "must measure up to the essentials of due process and fair treatment," *Kent* v. *United States*, 383 U. S. 541, 562 (1966).

To comport with "fundamental fairness," § 320.5(3)(b) must satisfy two requirements. First, it must advance goals commensurate with the burdens it imposes on constitutionally protected interests. Second, it must not punish the juveniles to whom it applies.

The majority only grudgingly and incompletely acknowledges the applicability of the first of these tests, but its grip on the cases before us is undeniable. It is manifest that § 320.5(3)(b) impinges upon fundamental rights. If the "liberty" protected by the Due Process Clause means anything, it means freedom from physical restraint. *Ingraham* v. *Wright*, 430 U. S. 651, 673–674 (1977); *Board of Regents* v. *Roth*, 408 U. S. 564, 572 (1972). Only a very important government interest can justify deprivation of liberty in this basic sense.[11]

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[11] This principle underlies prior decisions of the Court involving various constitutional provisions as they relate to pretrial detention. In *Gerstein*

The majority seeks to evade the force of this principle by discounting the impact on a child of incarceration pursuant to § 320.5(3)(b). The curtailment of liberty consequent upon detention of a juvenile, the majority contends, is mitigated by the fact that "juveniles, unlike adults, are always in some form of custody." *Ante*, at 265. In any event, the majority argues, the conditions of confinement associated with "secure detention" under § 320.5(3)(b) are not unduly burdensome. *Ante*, at 271. These contentions enable the majority to suggest that § 320.5(3)(b) need only advance a "legitimate state objective" to satisfy the strictures of the Due Process Clause. *Ante*, at 256–257, 263–264, 274.[12]

The majority's arguments do not survive scrutiny. Its characterization of preventive detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously. Surely there is a qualitative difference between imprisonment and the condition of being subject to

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v. *Pugh*, 420 U. S. 103, 113–114 (1975), we relied in part on the severity of "[t]he consequences of prolonged detention" in construing the Fourth Amendment to forbid pretrial incarceration of a suspect for an extended period of time without "a judicial determination of probable cause." In *Stack* v. *Boyle*, 342 U. S. 1, 4–5 (1951), we stressed the importance of a person's right to freedom until proved guilty in construing the Eighth Amendment to proscribe the setting of bail "at a figure higher than an amount reasonably calculated to" assure the presence of the accused at trial. Cf. *Baker* v. *McCollan*, 443 U. S. 137, 149–150, 153 (1979) (STEVENS, J., dissenting).

[12] The phrase "legitimate governmental objective" appears at several points in the opinion of the Court in *Bell* v. *Wolfish*, 441 U. S. 520 (1979), *e. g.*, *id.*, at 538–539, and the majority may be relying implicitly on that decision for the standard it applies in these cases. If so, the reliance is misplaced. *Wolfish* was exclusively concerned with the constitutionality of *conditions* of pretrial incarceration under circumstances in which the legitimacy of the incarceration itself was undisputed; the Court avoided any discussion of the showing a State must make in order to justify pretrial detention in the first instance. See *id.*, at 533–534, and n. 15. The standard employed by the Court in *Wolfish* thus has no bearing on the problem before us.

the supervision and control of an adult who has one's best interests at heart. And the majority's depiction of the nature of confinement under § 320.5(3)(b) is insupportable on this record. As noted above, the District Court found that secure detention entails incarceration in a facility closely resembling a jail and that pretrial detainees are sometimes mixed with juveniles who have been found to be delinquent. *Supra*, at 287–288. Evidence adduced at trial reinforces these findings. For example, Judge Quinones, a Family Court Judge with eight years of experience, described the conditions of detention as follows:

> "Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect." App. 270.

Many other observers of the circumstances of juvenile detention in New York have come to similar conclusions.[13]

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[13] All of the 34 juveniles in the sample were detained in Spofford Juvenile Center, the detention facility for New York City. Numerous studies of that facility have attested to its unsavory characteristics. See, *e. g.*, Citizens' Committee for Children of New York, Inc., Juvenile Detention Problems in New York City 3–4 (1970); J. Stone, R. Ruskin, & D. Goff, An Inquiry into the Juvenile Centers Operated by the Office of Probation 25–27, 52–54, 79–80 (1971). Conditions in Spofford have been successfully challenged on constitutional grounds (by a group of inmates of a different type), see *Martarella* v. *Kelley*, 359 F. Supp. 478 (SDNY 1973), but nevertheless remain grim, see Mayor's Task Force on Spofford: First Report v, viii–ix, 20–21 (June 1978). Not surprisingly, a former New York City Deputy Mayor for Criminal Justice has averred that "Spofford is, in many ways, indistinguishable from a prison." Petitioners' Exhibit 30, ¶ 6 (affidavit of Herbert Sturz, June 29, 1978).

In short, fairly viewed, pretrial detention of a juvenile pursuant to § 320.5(3)(b) gives rise to injuries comparable to those associated with imprisonment of an adult. In both situations, the detainee suffers stigmatization and severe limitation of his freedom of movement. See *In re Winship*, 397 U. S. 358, 367 (1970); *In re Gault*, 387 U. S., at 27. Indeed, the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably "delinquent."[14] Such serious injuries to presumptively innocent persons—encompassing the curtailment of their constitutional rights to liberty—can be justified only by a weighty public interest that is substantially advanced by the statute.[15]

The applicability of the second of the two tests is admitted even by the majority. In *Bell* v. *Wolfish*, 441 U. S. 520, 535

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[14] Cf. Aubry, The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California, 1 Black L. J. 160, 164 (1971).

[15] This standard might be refined in one of two ways. First, it might be argued that, because § 320.5(3)(b) impinges upon "[l]iberty from bodily restraint," which has long been "recognized as the core of the liberty protected by the Due Process Clause," *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 18 (1979) (POWELL, J., concurring in part and dissenting in part), the provision can pass constitutional muster only if it promotes a "compelling" government interest. See *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d 682, 687, 350 N. E. 2d 906, 908 (1976) (requiring a showing of a "compelling State interest" to uphold § 320.5(3)(b)); cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969). Alternatively, it might be argued that the comparatively brief period of incarceration permissible under the provision warrants a slight lowering of the constitutional bar. Applying the principle that the strength of the state interest needed to legitimate a statute depends upon the *degree* to which the statute encroaches upon fundamental rights, see *Williams* v. *Illinois*, 399 U. S. 235, 259–260, 262–263 (1970) (Harlan, J., concurring in result), it might be held that an important—but not quite "compelling"—objective is necessary to sustain § 320.5(3)(b). In the present context, there is no need to choose between these doctrinal options, because § 320.5(3)(b) would fail either test.

(1979), the Court held that an adult may not be punished prior to determination that he is guilty of a crime.[16] The majority concedes, as it must, that this principle applies to juveniles. *Ante*, at 264, 269. Thus, if the only purpose substantially advanced by § 320.5(3)(b) is punishment, the provision must be struck down.

For related reasons, § 320.5(3)(b) cannot satisfy either of the requirements discussed above that together define "fundamental fairness" in the context of pretrial detention.

B

Appellants and the majority contend that § 320.5(3)(b) advances a pair of intertwined government objectives: "protecting the community from crime," *ante*, at 264, and "protecting a juvenile from the consequences of his criminal activity," *ante*, at 266. More specifically, the majority argues that detaining a juvenile for a period of up to 17 days prior to his trial has two desirable effects: it protects society at large from the crimes he might have committed during that period if released; and it protects the juvenile himself "both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Ante*, at 264–266.

Appellees and some *amici* argue that public purposes of this sort can never justify incarceration of a person who has not been adjudicated guilty of a crime, at least in the absence of a determination that there exists probable cause to believe he committed a criminal offense.[17] We need not reach that categorial argument in these cases because, even if the purposes identified by the majority are conceded to be compelling, they are not sufficiently promoted by detention pursuant to § 320.5(3)(b) to justify the concomitant impairment of the juveniles' liberty interests.[18] To state the case more precisely, two circumstances in combination render § 320.5(3)(b) invalid *in toto:* in the large majority of cases in which the provision is invoked, its asserted objectives are either not advanced at all or are only minimally promoted; and, as the provision is written and administered by the state courts, the cases in which its asserted ends are significantly advanced cannot practicably be distinguished from the cases in which they are not.

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[16] See also *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, and n. 40, 673–674 (1977); *Gregory* v. *Chicago*, 394 U. S. 111, 112 (1969); *Thompson* v. *Louisville*, 362 U. S. 199, 206 (1960).

[17] Cf. *Sellers* v. *United States*, 89 S. Ct. 36, 38, 21 L. Ed. 2d 64, 67 (1968) (Black, J., in chambers) (questioning whether a defendant's dangerousness can ever justify denial of bail).

1

Both of the courts below concluded that only occasionally and accidentally does pretrial detention of a juvenile under § 320.5(3)(b) prevent the commission of a crime. Three subsidiary findings undergird that conclusion. First, Family Court judges are incapable of determining which of the juveniles who appear before them would commit offenses before their trials if left at large and which would not. In part, this incapacity derives from the limitations of current knowledge concerning the dynamics of human behavior. On the basis of evidence adduced at trial, supplemented by a thorough review of the secondary literature, see 513 F. Supp., at 708–712, and nn. 31–32, the District Court found that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime." *Id.*, at 708. The evidence supportive of this finding is overwhelming.[19] An independent impediment to identification of the defendants who would misbehave if released is the paucity of data available at an initial appearance. The judge must make his decision whether to detain a juvenile on the basis of a set of allegations regarding the child's alleged offense, a cursory review of his background and criminal record, and the recommendation of a probation officer who, in the typical case, has seen the child only once. *Id.*, at 712. In view of this scarcity of relevant information, the District Court credited the testimony of appellees' expert witness, who "stated that he would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance—virtually wholly unpredictable." *Id.*, at 708.[20]

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[18] An additional reason for not reaching appellees' categorical objection to the purposes relied upon by the State is that the Court of Appeals did not pass upon the validity of those objectives. See 689 F. 2d, at 372. We are generally chary of deciding important constitutional questions not reached by a lower court.

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[19] See, *e. g.*, American Psychiatric Association, Clinical Aspects of the Violent Individual 27–28 (1974); Cocozza & Steadman, The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence, 29 Rutgers L. Rev. 1084, 1094–1101 (1976); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins In the Courtroom, 62 Calif. L. Rev. 693 (1974); Schlesinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978); Steadman & Cocozza, Psychiatry, Dangerousness and the Repetitively Violent Offender, 69 J. Crim. L. & C. 226, 229–231 (1978); Wenk, Robison, & Smith, Can Violence Be Predicted?, 18 Crime & Delinquency 393, 401 (1972); Preventive Detention: An Empirical Analysis, 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 289 (1971).

[20] The majority brushes aside the District Court's findings on this issue with the remark that "a prediction of future criminal conduct . . . forms an important element in many decisions, and we have specifically rejected the contention . . . 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.'" *Ante*, at 278–279 (footnote and citation omitted). Whatever the merits of the decisions upon which the majority relies, but cf., *e. g.*, *Barefoot* v. *Estelle*, 463 U. S. 880, 909 (1983) (MARSHALL, J., dissenting), they do not control the problem before us. In each of the cases in which the Court has countenanced reliance upon a prediction of future conduct in a decisionmaking process impinging upon life or liberty, the affected person had already been convicted of a crime. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979)

Second, § 320.5(3)(b) is not limited to classes of juveniles whose past conduct suggests that they are substantially more likely than average juveniles to misbehave in the immediate future. The provision authorizes the detention of persons arrested for trivial offenses[21] and persons without any prior contacts with juvenile court. Even a finding that there is probable cause to believe a juvenile committed the offense with which he was charged is not a prerequisite to his detention. See *supra*, at 285, and n. 6.[22]

(grant of parole); *Jurek* v. *Texas*, 428 U. S. 262 (1976) (death sentence); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972) (parole revocation). The constitutional limitations upon the kinds of factors that may be relied on in making such decisions are significantly looser than those upon decisionmaking processes that abridge the liberty of presumptively innocent persons. Cf. *United States* v. *Tucker*, 404 U. S. 443, 446 (1972) ("[A] trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. . . . [B]efore making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

[21] For example, Tyrone Parson, aged 15, one of the members of the sample, was arrested for enticing others to play three-card monte. Petitioners' Exhibit 18b. After being detained for five days under § 320.5(3)(b), the petition against him was dismissed on the ground that "the offense alleged did not come within the provisions of the penal law." 513 F. Supp., at 698–699.

In contrast to the breadth of the coverage of the Family Court Act, the District of Columbia adult preventive-detention statute that was upheld in *United States* v. *Edwards*, 430 A. 2d 1321 (D. C. 1981), cert. denied, 455 U. S. 1022 (1982), authorizes detention only of persons charged with one of a prescribed set of "dangerous crime[s]" or "crime[s] of violence." D. C. Code §§ 23–1322(a)(1), (2) (1981).

Prediction whether a given person will commit a crime in the future is especially difficult when he has committed only minor crimes in the past. Cf. *Baldasar* v. *Illinois*, 446 U. S. 222, 231 (1980) (POWELL, J., dissenting) ("No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist").

[22] By contrast, under the District of Columbia statute, see n. 21, *supra*, the judge is obliged before ordering detention to find, *inter alia*, a "substantial probability" that the defendant committed the serious crime for which he was arrested. D. C. Code § 23–1322(b)(2)(C) (1981).

Third, the courts below concluded that circumstances surrounding most of the cases in which § 320.5(3)(b) has been invoked strongly suggest that the detainee would not have committed a crime during the period before his trial if he had been released. In a significant proportion of the cases, the juvenile had been released after his arrest and had not committed any reported crimes while at large, see *supra*, at 287; it is not apparent why a juvenile would be more likely to misbehave between his initial appearance and his trial than between his arrest and initial appearance. Even more telling is the fact that "the vast majority" of persons detained under § 320.5(3)(b) are released either before or immediately after their trials. 698 F. 2d, at 369; see 513 F. Supp., at 705. The inference is powerful that most detainees, when examined more carefully than at their initial appearances, are deemed insufficiently dangerous to warrant further incarceration.[23]

The rarity with which invocation of § 320.5(3)(b) results in detention of a juvenile who otherwise would have committed a crime fatally undercuts the two public purposes assigned to the statute by the State and the majority. The argument that § 320.5(3)(b) serves "the State's '*parens patriae* interest in preserving and promoting the welfare of the child,'" *ante*, at 265 (citation omitted), now appears particularly hollow. Most juveniles detained pursuant to the provision are not benefited thereby, because they would not have committed crimes if left to their own devices (and thus would not have been exposed to the risk of physical injury or the perils of the cycle of recidivism, see *ante*, at 266). On the contrary, these juveniles suffer several serious harms: deprivation of liberty and stigmatization as "delinquent" or "dangerous," as well as impairment of their ability to prepare their legal defenses.[24] The benefits even to those few juveniles who would have committed crimes if released are not unalloyed; the gains to them are partially offset by the aforementioned injuries. In view of this configuration of benefits and harms, it is not surprising that Judge Quinones repudiated the suggestion that detention under § 320.5(3)(b) serves the interests of the detainees. App. 269–270.

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[23] Both courts below made this inference. See 689 F. 2d, at 372; 513 F. Supp., at 705. Indeed, the New York Court of Appeals, in upholding the statute, did not disagree with this explanation of the incidence of its application. *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 690, 350 N. E. 2d, at 910.

Release (before or after trial) of some of the juveniles detained under § 320.5(3)(b) may well be due to a different factor: the evidence against them may be insufficient to support a finding of guilt. It is conceivable that some of those persons are so crime-prone that they would have committed an offense if not detained. But even the majority does not suggest that persons who could not be convicted of any crimes may nevertheless be imprisoned for the protection of themselves and the public.

The argument that § 320.5(3)(b) protects the welfare of the community fares little better. Certainly the public reaps no benefit from incarceration of the majority of the detainees who would not have committed any crimes had they been released. Prevention of the minor offenses that would have been committed by a small proportion of the persons detained confers only a slight benefit on the community.[25] Only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty interests of all the presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance.[26]

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[24] See testimony of Steven Hiltz, App. 130–134 (describing the detrimental effects of pretrial detention of a juvenile upon the preparation and presentation of his defense); cf. *Barker* v. *Wingo*, 407 U. S. 514, 533 (1972); *Bitter* v. *United States*, 389 U. S. 15, 16–17 (1967) *(per curiam); Stack* v. *Boyle*, 342 U. S., at 8; Miller, Preventive Detention—A Guide to the Eradication of Individual Rights, 16 How. L. J. 1, 15 (1970).

[25] Cf. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 381 (1970) ("[Under a statute proposed by the Attorney General,] trivial property offenses may be deemed sufficiently threatening to warrant preventive imprisonment. No tenable concept of due process could condone a balance that gives so little weight to the accused's interest in pretrial liberty").

2

The majority seeks to deflect appellees' attack on the constitutionality of § 320.5(3)(b) by contending that they have framed their argument too broadly. It is possible, the majority acknowledges, that "in some circumstances detention of a juvenile [pursuant to § 320.5(3)(b)] would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis." *Ante*, at 273; see *ante*, at 268–269, n. 18. The majority thus implies that, even if the Due Process Clause is violated by most detentions under § 320.5(3)(b) because those detainees would not have committed crimes if released, the statute nevertheless is not invalid "on its face" because detention of those persons who would have committed a serious crime comports with the Constitution. Separation of the properly detained juveniles from the improperly detained juveniles must be achieved through "case-by-case" adjudication.

There are some obvious practical impediments to adoption of the majority's proposal. Because a juvenile may not be incarcerated under § 320.5(3)(b) for more than 17 days, it would be impracticable for a particular detainee to secure his freedom by challenging the constitutional basis of his detention; by the time the suit could be considered, it would have been rendered moot by the juvenile's release or long-term detention pursuant to a delinquency adjudication.[27] Nor could an individual detainee avoid the problem of mootness by filing a suit for damages or for injunctive relief. This Court's declaration that § 320.5(3)(b) is not unconstitutional on its face would almost certainly preclude a finding that detention of a juvenile pursuant to the statute violated any clearly established constitutional rights; in the absence of such a finding all state officials would be immune from liability in damages, see *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). And, under current doctrine pertaining to the standing of an individual victim of allegedly unconstitutional conduct to obtain an injunction against repetition of that behavior, it is far from clear that an individual detainee would be able to obtain an equitable remedy. Compare *INS* v. *Delgado*, 466 U. S. 210, 217, n. 4 (1984), with *Los Angeles* v. *Lyons*, 461 U. S. 95, 105–106 (1983).

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[26] Some *amici* contend that a preventive-detention statute that, unlike § 320.5(3)(b), covered only specific categories of juveniles and embodied stringent procedural safeguards would result in incarceration only of juveniles very likely to commit crimes of violence in the near future. *E. g.*, Brief for American Bar Association as *Amicus Curiae* 9–14. It could be argued that, even though such a statute would unavoidably result in detention of *some* juveniles who would not have committed any offenses if released (because of the impossibility of reliably predicting the behavior of individual persons, see *supra*, at 293–294), the gains consequent upon the detention of the large proportion who would have committed crimes would be sufficient to justify the injuries to the other detainees. To decide the cases before us, we need not consider either the feasibility of such a scheme or its constitutionality.

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[27] The District Court, whose knowledge of New York procedural law surely exceeds ours, concluded that "[t]he short span of pretrial detention makes effective review impossible." 513 F. Supp., at 708, n. 29. The majority dismisses this finding, along with a comparable finding by the Court of Appeals, see 689 F. 2d, at 373, as "mistaken." *Ante*, at 280. But neither of the circumstances relied upon by the majority supports its confident judgment on this point. That the New York courts suspended their usual rules of mootness in order to consider an attack on the constitutionality of the statute as a whole, see *People ex rel. Wayburn* v. *Schupf*, 39 N. Y. 2d, at 686, 350 N. E. 2d, at 907–908, in no way suggests that they would be willing to do so if an individual detainee challenged the constitutionality of § 320.5(3)(b) as applied to him. The majority cites one case in which a detainee did obtain his release by securing a writ of habeas corpus. However, that case involved a juvenile who was not given a probable-cause hearing within six days of his detention—a patent violation of the state statute. See 513 F. Supp., at 708. That a writ of habeas corpus could be obtained on short notice to remedy a glaring statutory violation provides no support for the majority's suggestion that individual detainees could effectively petition for release by challenging the constitutionality of their detentions.

But even if these practical difficulties could be surmounted, the majority's proposal would be inadequate. Precisely because of the unreliability of any determination whether a particular juvenile is likely to commit a crime between his arrest and trial, see *supra*, at 293–294, no individual detainee would be able to demonstrate that he would have abided by the law had he been released. In other words, no configuration of circumstances would enable a juvenile to establish that he fell into the category of persons unconstitutionally detained rather than the category constitutionally detained.[28] Thus, to protect the rights of the majority of juveniles whose incarceration advances no legitimate state interest, § 320.5(3)(b) must be held unconstitutional "on its face."

C

The findings reviewed in the preceding section lend credence to the conclusion reached by the courts below: § 320.5(3)(b) "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts." 689 F. 2d, at 372; see 513 F. Supp., at 715–717.

The majority contends that, of the many factors we have considered in trying to determine whether a particular sanction constitutes "punishment," see *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963), the most useful are "whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned," *ibid.* (footnotes omitted). See *ante*, at 269. Assuming, *arguendo*, that this test is appropriate, but cf. *Bell* v. *Wolfish*, 441 U. S., at 564–565 (MARSHALL, J., dissenting), it requires affirmance in these cases. The alternative purpose assigned by the State to § 320.5(3)(b) is the prevention of crime by the detained juveniles. But, as has been shown, that objective is advanced at best sporadically by the provision. Moreover, § 320.5(3)(b) frequently is invoked under circumstances in which it is extremely unlikely that the juvenile in question would commit a crime while awaiting trial. The most striking of these cases involve juveniles who have been at large without mishap for a substantial period of time prior to their initial appearances, see *supra*, at 287, and detainees who are adjudged delinquent and are nevertheless released into the community. In short, § 320.5(3)(b) as administered by the New York courts surely "appears excessive in relation to" the putatively legitimate objectives assigned to it.

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[28] This problem is exacerbated by the fact that Family Court judges, when making findings justifying a detention pursuant to § 320.5(3)(b), do not specify whether there is a risk that the juvenile would commit a serious crime or whether there is a risk that he would commit a petty offense. A finding of the latter sort should not be sufficient under the Due Process Clause to justify a juvenile's detention. See *supra*, at 297–298, and n. 25. But a particular detainee has no way of ascertaining the grounds for his incarceration.

The inference that § 320.5(3)(b) is punitive in nature is supported by additional materials in the record. For example, Judge Quinones and even appellants' counsel acknowledged that one of the reasons juveniles detained pursuant to § 320.5(3)(b) usually are released after the determination of their guilt is that the judge decides that their pretrial detention constitutes sufficient punishment. 689 F. 2d, at 370–371, and nn. 27–28. Another Family Court Judge admitted using "preventive detention" to punish one of the juveniles in the sample. 513 F. Supp., at 708.[29]

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[29] See transcript of the initial appearance of Ramon Ramos, #1356/80, Judge Heller presiding, Petitioners' Exhibit 42, p. 11:

"This business now of being able to get guns, is now completely out of proportion. We are living in a jungle. We are living in a jungle, and it is time that these youths that are brought before the Court, know that they

In summary, application of the litmus test the Court recently has used to identify punitive sanctions supports the finding of the lower courts that preventive detention under § 320.5(3)(b) constitutes punishment. Because punishment of juveniles before adjudication of their guilt violates the Due Process Clause, see *supra*, at 291–292, the provision cannot stand.

III

If the record did not establish the impossibility, on the basis of the evidence available to a Family Court judge at a § 320.5(3)(b) hearing, of reliably predicting whether a given juvenile would commit a crime before his trial, and if the purposes relied upon by the State were promoted sufficiently to justify the deprivations of liberty effected by the provision, I would nevertheless still strike down § 320.5(3)(b) because of the absence of procedural safeguards in the provision. As Judge Newman, concurring in the Court of Appeals observed, "New York's statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty—likelihood of future criminal behavior." 689 F. 2d, at 375.

Appellees point out that § 320.5(3)(b) lacks two crucial procedural constraints. First, a New York Family Court judge is given no guidance regarding what kinds of evidence he should consider or what weight he should accord different sorts of material in deciding whether to detain a juvenile.[30] For example, there is no requirement in the statute that the

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are in a Court, and that if these allegations are true, that they are going to pay the penalty.

"As for the reasons I just state[d] on the record, . . . I am remand[ing] the respondent to the Commissioner of Juvenile Justice, secure detention."

[30] The absence of any limitations on the sorts of reasons that may support a determination that a child is likely to commit a crime if released means that the statutory requirement that the judge state "reasons" on the record, see *ante*, at 276, does not meaningfully constrain the decisionmaking process.

judge take into account the juvenile's background or current living situation. Nor is a judge obliged to attach significance to the nature of a juvenile's criminal record or the severity of the crime for which he was arrested.[31] Second, § 320.5(3)(b) does not specify how likely it must be that a juvenile will commit a crime before his trial to warrant his detention. The provision indicates only that there must be a "serious risk" that he will commit an offense and does not prescribe the standard of proof that should govern the judge's determination of that issue.[32]

Not surprisingly, in view of the lack of directions provided by the statute, different judges have adopted different ways of estimating the chances whether a juvenile will misbehave in the near future. "Each judge follows his own individual approach to [the detention] determination." 513 F. Supp., at 702; see App. 265 (testimony of Judge Quinones). This discretion exercised by Family Court judges in making detention decisions gives rise to two related constitutional problems. First, it creates an excessive risk that juveniles will be detained "erroneously"—*i. e.*, under circumstances in which no public interest would be served by their incarceration. Second, it fosters arbitrariness and inequality in a decisionmaking process that impinges upon fundamental rights.

A

One of the purposes of imposing procedural constraints on decisions affecting life, liberty, or property is to reduce the incidence of error. See *Fuentes* v. *Shevin*, 407 U. S. 67, 80–81 (1972). In *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), the Court identified a complex of considerations that has proved helpful in determining what protections are constitutionally required in particular contexts to achieve that end:

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[31] See 513 F. Supp., at 713:

"Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation."

[32] Cf. *Addington* v. *Texas*, 441 U. S. 418, 431–433 (1979) ("clear and convincing" proof constitutionally required to justify civil commitment to mental hospital).

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

As Judge Newman recognized, 689 F. 2d, at 375–376, a review of these three factors in the context of New York's preventive-detention scheme compels the conclusion that the Due Process Clause is violated by § 320.5(3)(b) in its present form. First, the private interest affected by a decision to detain a juvenile is personal liberty. Unnecessary abridgment of such a fundamental right, see *supra*, at 288, should be avoided if at all possible.

Second, there can be no dispute that there is a serious risk under the present statute that a juvenile will be detained erroneously—*i. e.*, despite the fact that he would not commit a crime if released. The findings of fact reviewed in the preceding sections make it apparent that the vast majority of detentions pursuant to § 320.5(3)(b) advance no state interest; only rarely does the statute operate to prevent crime. See *supra*, at 297–298. This high incidence of demonstrated error should induce a reviewing court to exercise utmost care in ensuring that no procedures could be devised that would improve the accuracy of the decisionmaking process. Opportunities for improvement in the extant regime are apparent even to a casual observer. Most obviously, some measure of guidance to Family Court judges regarding the evidence they should consider and the standard of proof they should use in making their determinations would surely contribute to the quality of their detention determinations.[33]

The majority purports to see no value in such additional safeguards, contending that activity of estimating the likelihood that a given juvenile will commit a crime in the near future involves subtle assessment of a host of variables, the precise weight of which cannot be determined in advance. *Ante*, at 279. A review of the hearings that resulted in the detention of the juveniles included in the sample of 34 cases reveals the majority's depiction of the decisionmaking process to be hopelessly idealized. For example, the operative portion of the initial appearance of Tyrone Parson, the three-card monte player,[34] consisted of the following:

> "COURT OFFICER: Will you identify yourself.
>
> . . . . .
>
> "TYRONE PARSON: Tyrone Parson, Age 15.
>
> "THE COURT: Miss Brown, how many times has Tyrone been known to the Court?
>
> . . . . .
>
> "MISS BROWN: Seven times.

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[33] Judge Newman, concurring below, pointed to three other protections lacking in § 320.5(3)(b): "the statute places no limits on the crimes for which the person subject to detention has been arrested . . . , the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused[,] . . . [and] the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released." 689 F. 2d, at 377. In my view, the absence of these constraints is most relevant to the question whether the ends served by the statute can justify its broad reach, see Part II–B, *supra*. However, as Judge Newman observed, they could also be considered procedural flaws. Certainly, a narrowing of the categories of persons covered by § 320.5(3)(b), along the lines sketched by Judge Newman, would reduce the incidence of error in the application of the provision.

[34] See n. 21, *supra*.

> "THE COURT: Remand the respondent." Petitioners' Exhibit 18a.[35]

This kind of parody of reasoned decisionmaking would be less likely to occur if judges were given more specific and mandatory instructions regarding the information they should consider and the manner in which they should assess it.

Third and finally, the imposition of such constraints on the deliberations of the Family Court judges would have no adverse effect on the State's interest in detaining dangerous juveniles and would give rise to insubstantial administrative burdens. For example, a simple directive to Family Court judges to state on the record the significance they give to the seriousness of the offense of which a juvenile is accused and to the nature of the juvenile's background would contribute materially to the quality of the decisionmaking process without significantly increasing the duration of initial appearances.

In summary, the three factors enumerated in *Mathews* in combination incline overwhelmingly in favor of imposition of more stringent constraints on detention determinations under § 320.5(3)(b). Especially in view of the impracticability of correcting erroneous decisions through judicial review, see *supra*, at 298–300, the absence of meaningful procedural safeguards in the provision renders it invalid. See *Santosky* v. *Kramer*, 455 U. S. 745, 757, and n. 9 (1982).

B

A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights. Two concerns underlie this principle: excessive discretion fosters inequality in the distribution of entitlements and harms, inequality which is especially troublesome when those benefits and burdens are great; and discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights.

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[35] Parson's case is not unique. The hearings accorded Juan Santiago and Daniel Nelson, for example, though somewhat longer in duration, were nearly as cavalier and undiscriminating. See Petitioners' Exhibits 13a, 22a.

So, in striking down on vagueness grounds a vagrancy ordinance, we emphasized the "unfettered discretion it places in the hands of the . . . police." *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 168 (1972). Such flexibility was deemed constitutionally offensive because it "permits and encourages an arbitrary and discriminatory enforcement of the law." *Id.*, at 170. Partly for similar reasons, we have consistently held violative of the First Amendment ordinances which make the ability to engage in constitutionally protected speech "contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub* v. *City of Baxley*, 355 U. S. 313, 322 (1958); accord, *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147, 151, 153 (1969). Analogous considerations inform our understanding of the dictates of the Due Process Clause. Concurring in the judgment in *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), striking down a statute that conditioned the right to marry upon the satisfaction of child-support obligations, JUSTICE POWELL aptly observed:

> "Quite apart from any impact on the truly indigent, the statute appears to 'confer upon [the judge] a license for arbitrary procedure,' in the determination of whether an applicant's children are 'likely thereafter to become public charges.' A serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction in this area." *Id.*, at 402, n. 4 (quoting *Kent* v. *United States*, 383 U. S., at 553).

The concerns that powered these decisions are strongly implicated by New York's preventive-detention scheme. The effect of the lack of procedural safeguards constraining detention decisions under § 320.5(3)(b) is that the liberty of a juvenile arrested even for a petty crime is dependent upon the "caprice" of a Family Court judge. See 513 F. Supp., at 707. The absence of meaningful guidelines creates opportunities for judges to use illegitimate criteria when deciding whether juveniles should be incarcerated pending their trials—for example, to detain children for the express purpose of punishing them.[36] Even the judges who strive conscientiously to apply the law have little choice but to assess juveniles' dangerousness on the basis of whatever standards they deem appropriate.[37] The resultant variation in detention decisions gives rise to a level of inequality in the deprivation of a fundamental right too great to be countenanced under the Constitution.

IV

The majority acknowledges—indeed, founds much of its argument upon—the principle that a State has both the power and the responsibility to protect the interests of the children within its jurisdiction. See *Santosky* v. *Kramer*, *supra*, at 766. Yet the majority today upholds a statute whose net impact on the juveniles who come within its purview is overwhelmingly detrimental. Most persons detained under the provision reap no benefit and suffer serious injuries thereby. The welfare of only a minority of the detainees is even arguably enhanced. The inequity of this regime, combined with the arbitrariness with which it is administered, is bound to disillusion its victims regarding the virtues of our system of criminal justice. I can see—and the majority has pointed to—no public purpose advanced by the statute sufficient to justify the harm it works.

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[36] See n. 29, *supra*.

[37] See 513 F. Supp., at 708:

"It is clear that the judge decides on pretrial detention for a variety of reasons—as a means of protecting the community, as the policy of the judge to remand, as an express punitive device, or because of the serious nature of the charge[,] among others" (citations omitted).

I respectfully dissent.

COLORADO *v.* NEW MEXICO ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 80, Orig. Argued January 9, 1984—Decided June 4, 1984

In this original action, Colorado seeks an equitable apportionment of the waters of the Vermejo River, which originates in Colorado and flows into New Mexico. Historically, all of the river's waters have been used exclusively by farm and industrial users in New Mexico. After a trial at which both States presented extensive evidence, the Special Master recommended that Colorado be allowed to divert 4,000 acre-feet of water per year. His recommendation rested on the grounds that New Mexico could compensate for some or all of the proposed Colorado diversion through reasonable water conservation measures, and that the injury, if any, to New Mexico would be outweighed by the benefit to Colorado from the diversion. In considering New Mexico's exceptions to the Master's report, this Court held, *inter alia*, that the Master properly did not focus exclusively on the priority of uses along the river, and that other factors—such as waste, availability of reasonable conservation measures, and the balance of benefit and harm from diversion—could be considered in the apportionment calculus. 459 U. S. 176. The case was remanded to the Master for additional specific findings to assist the Court in assessing whether the river's waters could reasonably be made available for diversion and in balancing the benefit and harm from diversion. On the basis of the evidence previously received, the Master then developed additional factual findings and reaffirmed his original recommendation. New Mexico again filed exceptions to the Master's report.

Held:

1. In this action for equitable apportionment, Colorado's proof is to be judged by a clear-and-convincing-evidence standard. Requiring Colorado to present such evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision. In addition, the standard accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses. Pp. 315–317.

2. Colorado has not met its burden of proving that a diversion should be permitted. Pp. 317–323.

(a) Colorado has not demonstrated, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion. For example, though Colorado alleged that New Mexico could improve its administration of water supplies, it did not point to specific measures New Mexico could take to conserve water. Society's interest in minimizing erroneous decisions in equitable apportionment cases requires that hard facts, not suppositions or opinions, be the basis for interstate diversions. Moreover, there is no evidence that Colorado has undertaken reasonable steps to minimize the amount of the diversion that will be required. Pp. 317–321.

(b) Nor has Colorado sustained its burden of showing that any injury to New Mexico would be outweighed by the benefits to Colorado from the proposed diversion. Colorado has not committed itself to any specific long-term use for which future benefits can be studied and predicted. By contrast, New Mexico has attempted to identify the harms that would result from the proposed diversion. Asking for absolute precision in forecasts about the benefits and harms of a diversion would be unrealistic, but a State proposing a diversion must conceive and implement some type of long-range planning and analysis of the diversion it proposes, thereby reducing the uncertainties with which equitable apportionment judgments are made. Pp. 321–323.

(c) The mere fact that the Vermejo River originates in Colorado does not automatically entitle Colorado to a share of the river's waters. Equitable apportionment of appropriated water rights turns on the benefits, harms, and efficiencies of competing uses, and thus the source of the river's waters is essentially irrelevant to the adjudication of these sovereigns' competing claims. P. 323.

Exceptions sustained and case dismissed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 324.

Richard A. Simms argued the cause for defendants. With him on the briefs were *Paul G. Bardacke*, Attorney General of New Mexico, *pro se*, and *Peter T. White* and *Jay F. Stein*, Special Assistant Attorneys General.

Robert F. Welborn, Special Assistant Attorney General of Colorado, argued the cause for plaintiff. With him on the brief were *Duane Woodard*, Attorney General, and *William A. Paddock*, First Assistant Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. 459 U. S. 176 (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

I

The facts of this litigation were set forth in detail in our opinion last Term, see *id.*, at 178–183, and we need recount them here only briefly. The Vermejo River is a small, nonnavigable stream, originating in the snow belt of the Rocky Mountains. The river flows southeasterly into New Mexico for roughly 55 miles before feeding into the Canadian River. Though it begins in Colorado, the major portion of the Vermejo River is located in New Mexico. Its waters historically have been used exclusively by farm and industrial users in that State.

In 1975, however, a Colorado corporation, Colorado Fuel and Iron Steel Corp. (C. F. & I.), proposed to divert water from the Vermejo River for industrial and other uses in Colorado. As a consequence, several of the major New Mexico users sought and obtained an injunction against the proposed diversion. The State of Colorado, in turn, filed a motion for leave to file an original complaint with this Court, seeking an equitable apportionment of the Vermejo River's waters. We granted Colorado its leave to file, 439 U. S. 975 (1978), and the Court of Appeals for the Tenth Circuit stayed C. F. & I.'s appeal pending our resolution of the equitable apportionment issue.

We then appointed a Special Master, 441 U. S. 902 (1979), the Honorable Ewing T. Kerr, Senior Judge of the United States District Court for the District of Wyoming, who held a lengthy trial at which both States presented extensive evidence. On the basis of this evidence, the Master recommended that Colorado be allowed to divert 4,000 acre-feet of water per year. His recommendation rested on two grounds: first, that New Mexico could compensate for some or all of the Colorado diversion through reasonable water conservation measures; and second, that the injury, if any, to New Mexico would be outweighed by the benefit to Colorado from the diversion.

New Mexico took exceptions, both legal and factual, to the Master's recommendation. As to the Master's view of the law of equitable apportionment, New Mexico contended that the Master erred in not focusing exclusively on the priority of uses along the Vermejo River. 459 U. S., at 181–182. The Court rejected that contention:

> "We recognize that the equities supporting the protection of existing economies will usually be compelling. . . . Under some circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State. This may be the case, for example, where the State seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result. In the determination of whether the State proposing the diversion has carried this burden, an important consideration is whether the existing users could offset the diversion by reasonable conservation measures . . . ." *Id.*, at 187–188 (footnote omitted).

In short, though the equities presumptively supported protection of the established senior uses, the Court concluded that other factors—such as waste, availability of reasonable conservation measures, and the balance of benefit and harm from diversion—could be considered in the apportionment calculus. *Ibid.*

New Mexico also took issue with the factual predicates of the Master's recommendation. Specifically, it contended that Colorado had failed to prove by clear and convincing evidence that New Mexico currently uses more than its equitable share of the Vermejo River's waters. On this matter, we found the Master's report unclear and determined that a remand would be appropriate.

To help this Court assess whether Vermejo River water could reasonably be made available for diversion, the Master was instructed to make specific findings concerning:

> "(1) the existing uses of water from the Vermejo River, and the extent to which present levels of use reflect current or historical water shortages or the failure of existing users to develop their uses diligently;
>
> "(2) the available supply of water from the Vermejo River, accounting for factors such as variations in stream flow, the needs of current users for a continuous supply, the possibilities of equalizing and enhancing the water supply through water storage and conservation, and the availability of substitute sources of water to relieve the demand for water from the Vermejo River; [and]
>
> "(3) the extent to which reasonable conservation measures in both States might eliminate waste and inefficiency in the use of water from the Vermejo River[.]" *Id.*, at 189–190.

Then, to assist this Court in balancing the benefit and harm from diversion, the Master was asked to make findings concerning:

> "(4) the precise nature of the proposed interim and ultimate use in Colorado of water from the Vermejo River,

> and the benefits that would result from a diversion to Colorado; [and]
>
> "(5) the injury, if any, that New Mexico would likely suffer as a result of any such diversion, taking into account the extent to which reasonable conservation measures could offset the diversion." *Id.*, at 190 (footnote omitted).

Finally, the Court authorized the Master to consider any other relevant factors, to gather any additional evidence necessary to making the requested findings, and to offer another—although not necessarily different—recommendation. *Id.*, at 190, and n. 14.

On remand, New Mexico filed a motion to submit new evidence. Colorado opposed the motion and attested that, unless the record were reopened, it did not intend to offer any additional evidence in support of its case. The Special Master denied New Mexico's motion. Then, on the basis of the evidence previously received, he developed additional factual findings and reaffirmed his original recommendation.

II

Last Term, because our initial inquiry turned on the factors relevant to determining a just apportionment, the Court explained in detail the law of equitable apportionment. This Term, because our inquiry turns on the evidentiary material Colorado has offered in support of its complaint, we find it necessary to explain the standard by which we judge proof in actions for equitable apportionment.

The function of any standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). By informing the factfinder in this manner, the standard of proof allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the ultimate decision. See *Addington* v. *Texas*, 441 U. S. 418, 423–425 (1979).

Last Term, the Court made clear that Colorado's proof would be judged by a clear-and-convincing-evidence standard. *Colorado* v. *New Mexico*, 459 U. S., at 187–188, and n. 13. In contrast to the ordinary civil case, which typically is judged by a "preponderance of the evidence" standard, we thought a diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable." See C. McCormick, Law of Evidence § 320, p. 679 (1954). This would be true, of course, only if the material it offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence New Mexico offered in opposition. See generally McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242, 251–254 (1944).

Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote." *Colorado* v. *New Mexico*, 459 U. S., at 187; see also *id.*, at 182, n. 9. In addition, the clear-and-convincing-evidence standard accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses: "[T]he rule of priority [will] not be strictly applied where it 'would work more hardship' on the junior user 'than it would bestow benefits' on the senior user . . . [,though] the equities supporting the protection of existing economies will usually be compelling." *Id.*, at 186–187 (quoting *Nebraska* v. *Wyoming*, 325 U. S. 589, 619 (1945)). In short, Colorado's diversion should and will be allowed only if actual inefficiencies in present uses or future benefits from other uses are highly probable.

III

With these principles in mind, we turn to review the evidence the parties have submitted concerning the proposed diversion. As our opinion noted last Term, New Mexico has met its initial burden of showing "real or substantial injury" because "*any* diversion by Colorado, unless offset by New Mexico at its own expense, [would] necessarily reduce the amount of water available to New Mexico users." 459 U. S., at 188, n. 13. Accordingly, the burden shifted on remand to Colorado to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to New Mexico would be outweighed by the benefits to Colorado from the diversion. Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with us. See *Mississippi* v. *Arkansas*, 415 U. S. 289, 291–292, 294 (1974); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4054, pp. 196–197 (1978). Upon our independent review of the record, we find that Colorado has failed to meet its burden.

A

To establish whether Colorado's proposed diversion could be offset by eliminating New Mexico's nonuse or inefficiency, we asked the Master to make specific findings concerning existing uses, supplies of water, and reasonable conservation measures available to the two States. After assessing the evidence both States offered about existing uses and available supplies, the Master concluded that "current levels of use primarily reflect failure on the part of existing users to fully develop and put to work available water." Additional Factual Findings 28. Moreover, with respect to reasonable conservation measures available, the Master indicated his belief that more careful water administration in New Mexico would alleviate shortages from unregulated stockponds, fishponds, and water detention structures, prevent waste from blockage and clogging in canals, and ensure that users fully devote themselves to development of available resources. He further concluded that "the heart of New Mexico's water problem is the Vermejo Conservancy District," *id.*, at 20, which he considered a failed "reclamation project [that had] never lived up to its expectations or even proved to be a successful project, . . . and [that] quite possibly should never have been built." *Id.*, at 8. Though the District was quite arguably in the "middle range in reclamation project efficiencies," *id.*, at 20, the Master was of the opinion "that [the District's] inefficient water use should not be charged to Colorado." *Ibid.* Furthermore, though Colorado had not submitted evidence or testimony of any conservation measures that C. F. & I. would take, the Master concluded that "it is not for the Master or for New Mexico to say that reasonable attempts to conserve water will not be implemented by Colorado." *Id.*, at 21.

We share the Master's concern that New Mexico may be overstating the amount of harm its users would suffer from a diversion. Water use by appropriators along the Vermejo River has remained relatively stable for the past 30 years, and this historic use falls substantially below the decreed rights of those users. Unreliable supplies satisfactorily explain some of this difference, but New Mexico's attempt to excuse three decades of nonuse in this way is, at the very least, suspect. Nevertheless, whatever the merit of New Mexico's explanation, we cannot agree that Colorado has met its burden of identifying, by clear and convincing evidence, conservation efforts that would preserve any of the Vermejo River water supply.

For example, though Colorado alleged that New Mexico could improve its administration of stockponds, fishponds, and water detention structures, it did not actually point to specific measures New Mexico could take to conserve water. Thus, ultimately all the Master could conclude was that some unspecified "[r]eduction and/or regulation . . . could not help but be an effort, however small, to conserve the water supply. . . ." *Id.*, at 18. Similarly, though Colorado asserted that more rigorous water administration could eliminate blocked diversion works and ensure more careful development of water supplies, it did not show how this would actually preserve existing supplies. Even if Colorado's generalizations were true, they would prove only that some junior users are diverting water that senior appropriators ultimately could call; they would not prove that water is being wasted or used inefficiently by those actually diverting it. In short, the administrative improvements Colorado suggests are either too general to be meaningful or involve redistribution, as opposed to preservation, of water supplies.

Colorado's attack on current water use in the Vermejo Conservancy District is inadequate for much the same reason. Our cases require only conservation measures that are "financially and physically feasible" and "within practicable limits." See, *e. g.*, *Colorado* v. *New Mexico*, 459 U. S., at 192; *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922). New Mexico submitted substantial evidence that the District is in the middle of reclamation project efficiencies and that the District has taken considerable independent steps—including, the construction, at its own expense and on its own initiative, of a closed stockwater delivery system—to improve the efficiency of its future water use. Additional Factual Findings 20. The Master did not find to the contrary; indeed, he commended New Mexico for the substantial efforts it had taken. See *ibid.* Nevertheless, he accepted Colorado's general assertion that the District was not as efficient as other reclamation projects and concluded that New Mexico's inefficient use should not be charged to Colorado. But Colorado has not identified any "financially and physically feasible" means by which the District can further eliminate or reduce inefficiency and, contrary to the Master's suggestion, we believe that the burden is on Colorado to do so. A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved, or with clear evidence that a project is far less efficient than most other projects. Mere assertions about the relative efficiencies of competing projects will not do.

Finally, there is no evidence in the record that "Colorado has undertaken reasonable steps to minimize the amount of the diversion that will be required." *Colorado* v. *New Mexico*, *supra*, at 186. Nine years have passed since C. F. & I. first proposed diverting water from the Vermejo River. Yet Colorado has presented no evidence concerning C. F. & I.'s inability to relieve its needs through substitute sources. Furthermore, there is no evidence that C. F. & I. has settled on a definite or even tentative construction design or plan, or that it has prepared an economic analysis of its proposed diversion. Indeed, C. F. & I. has not even conducted an operational study of the reservoir that Colorado contends will be built in conjunction with the proposed diversion. It may be impracticable to ask the State proposing a diversion to provide unerring proof of future uses and concomitant conservation measures that would be taken. But it would be irresponsible of us to apportion water to uses that have not been, at a minimum, carefully studied and objectively evaluated, not to mention decided upon. Financially and physically feasible conservation efforts include careful study of future, as well as prudent implementation of current, water uses. Colorado has been unwilling to take any concrete steps in this direction.

Society's interest in minimizing erroneous decisions in equitable apportionment cases requires that hard facts, not suppositions or opinions, be the basis for interstate diversions. In contrast to JUSTICE STEVENS, we do not believe Colorado has produced sufficient facts to show, by clear and convincing evidence, that reasonable conservation efforts will mitigate sufficiently the injury that New Mexico successfully established last Term that it would suffer were a diversion allowed. No State can use its lax administration to establish its claim to water. But once a State successfully proves that a diversion will cause it injury, the burden shifts to the diverter to show that reasonable conservation measures exist. Colorado has not carried this burden.

B

We also asked the Master to help us balance the benefits and harms that might result from the proposed diversion. The Master found that Colorado's proposed interim use is agricultural in nature and that more permanent applications might include use in coal mines, timbering, power generation, domestic needs, and other industrial operations. The Master admitted that "[t]his area of fact finding [was] one of the most difficult [both] because of the necessarily speculative nature of [the] benefits . . ." and because of Colorado's "natural reluctance to spend large amounts of time and money developing plans, operations, and cost schemes . . . ." Additional Factual Findings 23. Nevertheless, because the diverted water would, at a minimum, alleviate existing water shortages in Colorado, the Master concluded that the evidence showed considerable benefits would accrue from the diversion. Furthermore, the Master concluded that the injury, if any, to New Mexico would be insubstantial, if only because reasonable conservation measures could, in his opinion, offset the entire impact of the diversion. *Id.*, at 24–28.

Again, we find ourselves without adequate evidence to approve Colorado's proposed diversion. Colorado has not committed itself to any long-term use for which future benefits can be studied and predicted. Nor has Colorado specified how long the interim agricultural use might or might not last. All Colorado has established is that a steel corporation wants to take water for some unidentified use in the future.

By contrast, New Mexico has attempted to identify the harms that would result from the proposed diversion. New Mexico commissioned some independent economists to study the economic effects, direct and indirect, that the diversion would have on persons in New Mexico. The study these economists produced was submitted at the original hearing, conducted prior to the remand, as evidence of the injury that would result from the reduction in water supplies. No doubt, this economic analysis involves prediction and forecast. But the analysis is surely no more speculative than the generalizations Colorado has offered as "evidence." New Mexico, at the very least, has taken concrete steps toward addressing the query this Court posed last Term. Colorado has made no similar effort.

Colorado objects that speculation about the benefits of future uses is inevitable and that water will not be put to its best use if the expenditures necessary to development and operation must be made without assurance of future supplies. We agree, of course, that asking for absolute precision in forecasts about the benefits and harms of a diversion would be unrealistic. But we have not asked for such precision. We have only required that a State proposing a diversion conceive and implement some type of long-range planning and analysis of the diversion it proposes. Long-range planning and analysis will, we believe, reduce the uncertainties with which equitable apportionment judgments are made. If New Mexico can develop evidence to prove that its existing economy is efficiently using water, we see no reason why Colorado cannot take similar steps to prove that its future economy could do better.

In the nine years that have passed since C. F. & I. first requested a diversion, neither it nor Colorado has decided upon a permanent use for the diverted water. It therefore is no surprise that Colorado cannot conduct studies or make predictions about the benefits and harms of its proposed diversion. Under the clear-and-convincing-evidence standard, it is Colorado, and not New Mexico, that must bear the risk of error from the inadequacy of the information available.

C

As a final consideration, the Master pointed out that approximately three-fourths of the water in the Vermejo River system is produced in Colorado. He concluded, therefore, that "the equities are with Colorado, which requests only a portion of the water which it produces." Additional Factual Findings 29. Last Term, the Court rejected the notion that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the river's waters. *Colorado* v. *New Mexico*, 459 U. S., at 181, n. 8. Both Colorado and New Mexico recognize the doctrine of prior appropriation, *id.*, at 179, and appropriative, as opposed to riparian, rights depend on actual use, not land ownership. See *id.*, at 179, n. 4. It follows, therefore, that the equitable apportionment of appropriated rights should turn on the benefits, harms, and efficiencies of competing uses, and that the source of the Vermejo River's waters should be essentially irrelevant to the adjudication of these sovereigns' competing claims. *Id.*, at 181, n. 8. To the extent the Master continued to think the contrary, he was in error.

IV

We continue to believe that the flexible doctrine of equitable apportionment extends to a State's claim to divert previously appropriated water for future uses. But the State seeking such a diversion bears the burden of proving, by clear and convincing evidence, the existence of certain relevant factors. The complainant must show, for example, the extent to which reasonable conservation measures can adequately compensate for the reduction in supply due to the diversion, and the extent to which the benefits from the diversion will outweigh the harms to existing users. This evidentiary burden cannot be met with generalizations about unidentified conservation measures and unstudied speculation about future uses. The Special Master struggled, as best he could, to balance the evidentiary requirement against the inherent limitations of proving a beneficial future use. However, we do not find enough evidence to sustain his findings. Until Colorado can generate sufficient evidence to show that circumstances have changed and that a diversion is appropriate, the equities compel the continued protection of the existing users of the Vermejo River's waters.

Accordingly, we sustain the State of New Mexico's exceptions to the Special Master's Report and Additional Factual Findings, and dismiss the case.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Special Master has recommended the entry of a decree that would establish a diversion point in the Rocky Mountains and allow Colorado to divert no more than 4,000 acre-feet of water from the Vermejo River at that point; the diverted flow would make an intermountain transfer to supplement the presently inadequate flow of the Purgatoire River in Colorado. Accretions to the Vermejo below the diversion point, as well as the remainder of the original flow, would be available for the four principal users of the Vermejo River. Those four users are all in New Mexico and, of course, are upstream from the point where the Vermejo flows into the Canadian River.

A gauge that is located between the second and third of those four users has measured the flow of the Vermejo since 1916. The average annual flow of the river at that point since 1921 is 12,800 acre-feet; if the highest flow years are eliminated, the average is 10,900 acre-feet; if just the 1970's, which included especially dry years, are considered, the average is 8,262 acre-feet. No matter which figure is used, the Master's findings make it perfectly clear that the supply will remain adequate to satisfy the needs of the first three of the four principal appropriators on the river. *Colorado* v. *New Mexico*, 459 U. S. 176, 180 (1982) (hereinafter *Colorado I*). The critical dispute concerns the impact of the proposed diversion on the fourth—the Vermejo Conservancy District.

As the Court noted last Term, the Special Master's recommendation rested on "two alternative grounds: first, that New Mexico could compensate for some or all the Colorado diversion through reasonable water conservation measures; and second, that the injury, if any, to New Mexico would be outweighed by the benefit to Colorado from the diversion." *Id.*, at 181. Neither last Term, nor today, has the Court questioned the legal sufficiency of either of those grounds. Last Term, however, we requested the Master to provide us with additional factual findings; today the Court decides that the evidence does not support either of the Master's conclusions.

I respectfully disagree with the Court's treatment of two questions of law as well as with its evaluation of the facts.

I

The Court carefully explains why it has concluded that Colorado's proof should be judged by a clear-and-convincing-evidence standard. Inasmuch as this is the standard that the Special Master applied, that explanation is somewhat academic. The more troublesome question is what standard the Court should apply when it reviews 28 pages of detailed findings of fact by the judge whom we entrusted to conduct the lengthy trial in this case.

In the exercise of our original jurisdiction it may well be appropriate for us to make a *de novo* review of the record. The Master's report is, after all, merely a recommendation and there is no rule of law that requires us to accord it any special deference. I do not think that it would be appropriate in our original jurisdiction cases to accord the same degree of deference that Federal Rule of Civil Procedure 52(a) directs appellate judges to accord to the findings of fact made by district judges in ordinary litigation. Nevertheless, in my view, the cause of justice is more likely to be well served by according considerable deference to the Master's factual determinations. The record in cases such as this is typically lengthy, technical, and complex. The testimony and accompanying exhibits are much more difficult to assimilate and fully comprehend from the cold record than in the living trial, and of course we do not have the opportunity to make assessments of the demeanor of the witnesses.

The majority repeatedly states that it cannot "find enough evidence" to sustain the Master's findings. *E. g.*, *ante*, at 324. Based upon my examination of the trial testimony and exhibits presented to the Special Master, the majority's search for the evidence must have been cursory indeed. On its face, the majority opinion does not review the *evidence* in the case; instead it reviews the Special Master's findings, and in the process of doing so makes general observations regarding the evidence.[1]

If the Court gave the Special Master's report the respect that I regard as its due—rather than merely paying lipservice to a "tacit presumption of correctness" *ante*, at 317—I believe it would reach the conclusion that his recommendation is fully supported by his detailed findings and that those findings are fully supported by the evidence.

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[1] The majority does make a vague reference to certain economic studies commissioned by New Mexico. *Ante*, at 322. It is unclear, however, whether the majority actually relies on the substance of this evidence at all. Instead, we are told that New Mexico has "attempted to identify harms that would result" and has taken "concrete steps toward addressing the query this Court posed last Term." *Ibid.* It seems to matter little whether New Mexico has failed in this regard, because its analysis is "no more speculative" than Colorado's evidence. *Ibid.* The majority nevertheless gives New Mexico an "A for effort," as it were, whereas Colorado is seemingly penalized because it "has made no similar effort," *ibid.*

II

As THE CHIEF JUSTICE emphasized in his concurring opinion when the case was here last Term, "these two States come to the Court on equal footing." 459 U. S., at 191. Colorado is not entitled to any priority simply because the river originates in Colorado, and New Mexico is not entitled to an undiminished flow simply because of its first use. *Ibid.* We must balance the equities of the competing claims as they existed at the time this controversy began. Neither party should be permitted to improve its legal position by making changes in its use of the river's waters after our jurisdiction was invoked.

Once these principles are recognized, the "remaining questions are largely matters of fact. The evidence is voluminous, some of it highly technical and some quite conflicting. It has all been considered. The reasonable limits of an opinion do not admit of its extended discussion. We must be content to give our conclusions on the main questions and make such references to and comment on what is evidential as will point to the grounds on which the conclusions on those questions rest. As to minor questions we can only state the ultimate facts as we find them from the evidence." *Wyoming* v. *Colorado*, 259 U. S. 419, 471 (1922).

The first of the two alternative grounds supporting the Master's recommendation is that "New Mexico could compensate for some or all the Colorado diversion through reasonable water conservation measures," *Colorado I*, 459 U. S., at 181.

From the outset of the litigation, Colorado has claimed that New Mexico's use of the Vermejo's waters has been wasteful and inefficient. Colorado argues that one "fact" it has stressed throughout the litigation is that "a closed stock and domestic water system could eliminate the waste of over 2,000 acre-feet annually." Brief for Colorado 41, n. 20, 43–45. This fact—which is essentially undisputed—should be "hard" enough even for the majority, and provides irrefutable support for the conclusion that there was a significant amount of waste in the District when the lawsuit began.[2]

The Court sidesteps this point, accepting New Mexico's argument that the benefits of this system should inure solely to the benefit of New Mexico. But New Mexico simply continues to cling to the position that it should not be required to employ conservation measures to facilitate Colorado's proposed uses, notwithstanding the fact that we explicitly rejected this position last Term, 459 U. S., at 185–186, and in doing so quoted the following language from our seminal decision in this area:

> "The question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. . . . Both subscribe to the doctrine of appropriation, and by that doctrine rights to water are measured by what is reasonably required and applied. Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. This comports with the all-pervading spirit of the doctrine of appropriation and takes appropriate heed of the natural necessities out of which it arose. We think that doctrine lays on each of these States a duty to exercise her right reason-

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[2] Colorado further argues that the diversion it seeks would be totally offset by this savings. The argument is based on the fact that the saving of 2,000 acre-feet is realized at the reservoirs in the District, and that there is a significant loss of water during its transit from the river to the reservoirs, and also resulting from evaporation from the reservoirs. Thus, according to Colorado, an increase of 2,000 acre-feet of water in the reservoirs would offset a much larger diversion from the river itself. One need not fully accept this argument to recognize that the recommended 4,000 acre-feet diversion upstream would produce a significantly lower net loss at the reservoirs, or—more significantly—that when the complaint was filed, at least 2,000 acre-feet of water were being wasted by just one of the four principal users in New Mexico.

ably and in a manner calculated to conserve the common supply." *Wyoming* v. *Colorado*, 259 U. S., at 484.

New Mexico argues that the "important factor to consider in regard to the closed domestic and stockwater system is the timing." Reply Brief for New Mexico 23. It appears that before this controversy arose, water users in the area "began discussing the possibility of building a stockwater distribution system that could save the water necessarily lost" by using the open canals, and a cooperative of water users was formed to investigate "possible solutions." *Ibid.* (citing N. M. Ex. No. E–3). Although the users apparently recognized and considered the need to eliminate this waste before this controversy began, Tr. 2765, New Mexico did not take any action to eliminate the waste inherent in the District's 60-mile network of open canals until after CF&I generated this controversy in 1975 by obtaining a conditional right to divert water from the Vermejo River. We will never know if this waste would have been eliminated but for the existence of this lawsuit; we do know, however, that the water was still being wasted at the time this action was commenced.

With respect to the Vermejo Conservancy District—which of course is the only New Mexico user whose water supply might be impaired by the proposed diversion—the Master found:

> "At the heart of New Mexico's water problem is the Vermejo Conservancy District. Whether lack of administration, lack of diligence, lack of resources or lack of ability is the cause, there is little doubt that the District has failed as a water reclamation project and has serious financial and operational problems of its own. (Tr. 164–169). Several of the conservation problems already discussed are present in the District. Furthermore, there is a problem of loss through evaporation in the District's seven reservoirs. (Tr. 863, 1296–1299). The District has a 32% efficiency to farm headgates and

> an overall system efficiency of 24.6%. (Tr. 2576). New Mexico claims that the District falls middle range in reclamation project efficiencies. (Tr. 1410–1411). However, the existence of other low efficiency systems is not justification for failure to fully develop water sources here. New Mexico argues that Colorado has merely pointed out areas of inefficient water use without making viable suggestions which would reduce or eliminate the inefficiency. It is the opinion of the Master that New Mexico's inefficient water use should not be charged to Colorado." Additional Factual Findings 20.

The majority asserts that the "District was quite arguably in the 'middle range in reclamation project efficiencies,'" *ante*, at 318 (quoting Additional Factual Findings 20). See also *ante*, at 319 ("New Mexico submitted substantial evidence that the District is in the middle [range] . . ."). The Master did not find that the District was within the middle range of efficiencies; he simply observed that New Mexico claimed that was so. The majority cannot bring itself to find in favor of New Mexico on this point, and given the evidence on the issue, that is understandable. One expert witness simply stated: "I know of many systems in which the efficiency is in this neighborhood 30 to 40 percent. . . . I know of systems who have lower efficiencies simply because they cannot divert the available supply." Tr. 1410–1411. When asked if he recalled the testimony of another expert that inefficiencies in that range could not be tolerated in the arid area, the witness responded: "I think he mentioned it would be prudent to make better use of the water supply." *Id.*, at 1411. Other evidence was offered by New Mexico in support of its claim that its efficiency was in the middle range, *id.*, at 2720–2722, but the methodology of this evidence was highly questionable, *id.*, at 2730–2746, and one expert testified that the District was "extremely inefficient" and "less efficient than any system in Colorado with which I'm familiar." *Id.*, at 2576. It was this latter testimony that the Master credited in explicitly holding that the overall efficiency of the District was 24.6%, implicitly rejecting New Mexico's position. In light of all of the testimony, the Special Master concluded that "the existence of other low efficiency systems is not justification for failure to fully develop water sources here." Additional Factual Findings 20.

Moreover, the Master's findings plainly identify additional conservation measures that are available to New Mexico. They involve a more efficient management of the entire Vermejo River and all specific improvements at the Conservancy District.

The Master noted a marked contrast between the quality of water regulation and control in Colorado, which routinely monitors and takes affirmative measures to eliminate waste, *e. g.*, Tr. 515–524,[3] and that provided by New Mexico with respect to the Vermejo River.

In New Mexico, a Water Master is appointed to administer a district if a majority of the users on the system petition the State Engineer, or the State Engineer may do so on his own. *Id.*, at 2424. A Water Master monitors actual use, assures that uses are beneficial, and takes action if there is waste. There is no Water Master for the Vermejo. Incredibly, New Mexico's answer to the lack of monitoring is simply the assertion that if one farmer "saw another wasting water the matter would be quickly resolved by the water users. Tr. 2416–2417." Reply Brief for New Mexico 22. See also Tr. 1063–1064. The New Mexico State Engineer testified:

> "Even on the streams that have been adjudicated, we find it is generally not necessary to appoint a Water Master to measure the diversions and to enforce priorities and the water users themselves have generally been able to work these problems out among themselves, thus

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[3] It was in light of this evidence that the Special Master stated that "it is not for the Master or for New Mexico to say that reasonable attempts to conserve water will not be implemented by Colorado." Additional Factual Findings 21. See also *id.*, at 14–16.

> avoiding the onerous Water Master tax they would have to pay and the installation of meters that they would have to pay if they demanded strict priority administration.
>
> "Now on the Vermejo we occasionally have had complaints, 'Somebody is taking water out of priority, filling the lakes when I'm senior,' things of that nature, and we have sent people over there, talked to the water users in much the same way as they talk to each other. And I think have been of some assistance to them in resolving the problem among themselves." *Id.*, at 2416–2417.

The same engineer later insisted: "[W]e do not ignore waste. We don't ignore unadjudicated uses, that is, unauthorized uses for irrigation or any other purpose," *id.*, at 2418, but later admitted he simply did "not have the staff to go out and monitor for nonuse." *Id.*, at 2426. Indeed, with his limited staff, he would not even conduct random spot checks, and instead took the position that if he could not monitor all users for nonuse, he would not check for nonuse at all, though he did leave open the possibility in case of undefined "critical circumstances" which he had "not yet encountered." *Ibid.*

New Mexico had never installed any gauges at the state line, and did not assist in the maintenance of the gauges installed by Colorado. *Id.*, at 2432–2433. The New Mexico State Engineer did not know the approximate volume of water entering New Mexico, *id.*, at 2433, was "not prepared to so agree" with projections on the effect of the diversion on the New Mexico users, *ibid.*, and was "not able to agree or disagree" with figures regarding depletions, *id.*, at 2433–2434. He explained that such figures were not necessary for New Mexico's "administration" of the water rights under the New Mexico Vermejo Decree, because his department administered the decree "[o]nly in the sense of occasional fieldtrips to determine primarily whether any unauthorized acreage is being irrigated. . . . But we do not administer the priorities and diversion rates adjudicated by the decree." *Id.*, at 2434. "Who does do that?" counsel asked. The State Engineer responded:

> "We talked about that some. There is a working among themselves, a cooperation over there. The people work the problems out among themselves. Occasionally complaining to us. . . .
>
> "So long as they are able to resolve them and live with it, then day-to-day administration of priorities and the rates of diversion is not necessary and not in the public interest.
>
> "It's costly and it costs those water users when we have to undertake that kind of administration. And I think that gives them some incentive to be reasonably cooperative in working out their problems locally." *Id.*, at 2434–2435.

The problems with relying on complaints by other users are numerous and manifest. Of course, other New Mexico users would have little incentive to complain about waste by the most junior appropriator who in this case is farthest downstream—any water that reaches the District will simply flow into the Canadian River if it is not used by the District. Moreover, one wasteful user will think twice before pointing an accusatory finger at another user wasting water. Naturally without meters and without access to the other users' land, few complaints are likely. The New Mexico Engineer conceded some of these problems, but simply asserted that the District users "have a pretty good idea what is going on upstream particularly." *Id.*, at 2424.

In his additional factual findings, the Master specifically suggested the manifest deficiencies in New Mexico's administration could be remedied by "monitoring, regulating and controlling the system in an effort to determine more accurately actual use, and to decrease nonuse, waste and general inefficiency." Additional Factual Findings 18.[4] There is clear and convincing evidence to support the Special Master's findings and Colorado's argument that "by means of lax administrative practices, New Mexico precludes a determination of precise demand and actual beneficial use." Brief for Colorado 41.

Colorado is correct when it states: "New Mexico should not be permitted to use its own lack of administration and record keeping to establish its claim that no water can be conserved. That position, if accepted by the Court, would encourage states to obscure their water use practices and needs in order to avoid their duty to help conserve the common supply." *Id.*, at 42. Last Term we explicitly rejected New Mexico's inflexible interpretation of the doctrine of equitable apportionment under which priority would not merely be a guiding principle but the controlling one. 459 U. S., at 183–184. We further stated:

> "Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are 'reasonably required and applied.' *Wyoming* v. *Colo-*

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[4] The Master further stated:

"One final problem area which the Master believes could be improved with proper administration is the failure of many users to devote sufficient time to the complete development of available water resources. Water shortages are a reality in arid western states and, therefore, water conservation is a task that must involve serious effort and attention together with large amounts of time and financial input. The Master understands the intense feelings that some of the individual users have for their land and their lifestyle (See Tr. 2192, 2206, 2215–16); the Master also understands that farming or ranching often needs to be supplemented by other sources of income and, therefore, other jobs. (See Tr. 2207). However, New Mexico users, individuals, or otherwise, cannot expect to be able to take the available water in the Vermejo River at their convenience without taking the time and energy to implement changes and development to help conserve and augment the available water. Careful monitoring and regulation as part of a program of administration would aid all users in full development of their water supply and demands." *Id.*, at 19–20.

> *rado*, 259 U. S. 419, 484 (1922). Especially in those Western States where water is scarce, '[t]here must be no waste . . . of the "treasure" of a river. . . . Only diligence and good faith will keep the privilege alive.' *Washington* v. *Oregon*, 297 U. S. 517, 527 (1936). Thus, wasteful or inefficient uses will not be protected. See *ibid.; Nebraska* v. *Wyoming*, [325 U. S.], at 618. Similarly, concededly senior water rights will be deemed forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence. *Washington* v. *Oregon, supra*, at 527–528; *Colorado* v. *Kansas*, 320 U. S. 383, 394 (1943)." *Id.*, at 184.

New Mexico's manifestly lax, indeed virtually nonexistent, administration of the Vermejo surely substantially diminishes its rights to the waters. It invites waste, and renders the amount of that waste an unknown. "Protection of existing economies does not require that users be permitted to continue in unreasonably wasteful or inefficient practices." *Id.*, at 195 (O'CONNOR, J., concurring).

Moreover, the Special Master identified further specific problems causing water shortages or loss that might be alleviated by more careful administration:

> "One such problem is unregulated stockponds, fishponds and water detention structures. (Colo. Ex. Nos. 83, 40). While there is no question that such water use is to a certain extent necessary and beneficial, some sort of restrictions should apply. The numbers of ponds and other structures might be limited; when appropriate, reuse should be developed; and, the extent of water diverted to these areas should be in some way monitored or controlled. There is some indication by New Mexico that approximately 2,024 stockponds exist in Colfax County. (Defendants' Brief on Remand, p. 53). Reduction and/or regulation of some type could not help but

> be an effort, however small, to conserve the water supply and put it to beneficial use.
>
> "There is at least some evidence in reports from the Bureau of Reclamation that available runoff is not being diverted because dams and supply canals are blocked with silt and other debris. (Colo. Ex. Nos. 38, 40, 43; Tr. 2200). Proper administration would make users aware of the diversion problem and perhaps the state and its users together could find means to clean up the canals and prevent further clogging.
>
> "Another problem contributing to water waste and inefficiency is the inability to control headgate spills, divert all the water available, and fully develop all available stream sources. (Tr. 1830–1834, 1913–1914). Perhaps repair or revision of the necessary structures is all that is needed, or perhaps resort to a project of more complicated construction is necessary. The Master does not mean to suggest that burdensome and unreasonable efforts are required to be undertaken by New Mexico; however, reasonable repair based on careful development and administration could further reduce water shortages caused by inefficiency and waste." Additional Factual Findings 18–19.

Based on his review of the entire record, the Master found:

> "The Master is of the opinion that based on the evidence in its entirety, there is already sufficient water if New Mexico would take every opportunity to develop their resources fully. With proper conservation measures, there is an adequate water supply to satisfy the needs of all users." *Id.*, at 20–21.[5]

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[5] In the conclusion of the report the Master expressly stated:

"The available supply of water from the Vermejo River is sufficient for current New Mexico users, and with reasonable conservation measures would meet the needs of Colorado users as well. The available water supply can be enhanced through diligent and complete development of the Vermejo source as well as alternative sources. Many current users do not

III

Alternatively, the Master found that the benefit to Colorado from the diversion would outweigh the injury, if any, to New Mexico. The identifiable benefits to Colorado included projected permanent uses, interim uses, and the alleviation of the existing shortages in the Purgatoire River system.

The Master found that the proposed permanent uses include

> "a water powered hydroelectric plant generating power for a sawmill and related timber operations; coal washing at CF&I coal mines which would save transportation of the waste material from the mines to Pueblo, Colorado as well as development of additional coal mines; domestic and recreational purposes; possible synthetic fuel development; and, supplementation of current inadequate water supply in Colorado, including both CF&I uses as well as city and conservancy district (irrigation) shortages. (Tr. 738–749, 795–96, 623–639, 654, 656)." *Id.*, at 22.

The Master properly acknowledged that there could be no certainty that all of Colorado's proposed uses would actually materialize, but he concluded that "if even half of them are fully implemented," the diversion would be justified. He added:

> "One of the more important uses, which is certain to occur, is that the water appropriated from the Vermejo

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require a continuous supply and systems of reservoirs provide relief for those who do." Additional Factual Findings 28.

While Colorado did not undertake a detailed study of ways to improve the efficiency of the Vermejo system in New Mexico, thinking that it was not its place to administer the Vermejo in New Mexico, Tr. 238–239, based on the evidence available, its experts concluded that reasonable conservation measures would offset the diversion, *e. g.*, *id.*, at 243, 247, 876, 2579. This expert opinion testimony was plainly admissible on this ultimate question, Fed. Rules Evid. 702, 704, and together with other evidence in the record, fully supports the Master's conclusion on this question.

> River will supplement the existing insufficient water supply available to Colorado users. There seems to be little doubt that the Purgatoire River system is overappropriated, demand exceeding available supply. Any additional water would help to relieve shortages. CF&I and the city of Trinidad are but two examples of users that would benefit by having water available to meet their demands. (Tr. 535–538, 623–630, 795–796). There is some thought that the benefit of alleviating these shortages is sufficient to justify Colorado diversion of Vermejo water; however, Colorado's proposal does not stop with alleviating shortages but goes on with major plans for the water and thereby additional benefits." *Id.*, at 23–24.

With respect to the interim period pending full development of permanent uses, the Master found:

> "Colorado proposes to temporarily use the diverted Vermejo River water for irrigation of 2,000 acres of agricultural land owned by CF&I. Plans to use and reuse the water as it flows down the valley result in a high efficiency expectation. (Tr. 744–746)." *Id.*, at 22.

The Master credited evidence adduced by Colorado estimating that for its proposed agricultural uses of the diverted water "the efficiency will be 60–75%."[6]

The Master again emphasized that reasonable conservation measures "would reduce New Mexico's 'loss' to insignificance." *Id.*, at 27. He also noted that the District received a significant supply of water from the Chico River, that it has four large reservoirs that give it "great ability to store water and enhance the supply," *id.*, at 12[7] and, as the Court recognizes, *ante*, at 318, the District has historically used less water than was available to it.[8] Finally, the Master summarized his conclusions concerning the District by stating that "shortages resulting from [the] Colorado diversion (if they exist at all) would be experienced in a project that has failed from the beginning to develop its allotted acreage, has failed to meet its financial obligations, and quite possibly should never have been built." Additional Factual Findings 8.

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[6] "There is no reason to doubt the validity of Colorado's proposals or intentions. Even if the actual does not comport with the ideal, it is not for the Master or for New Mexico to say that reasonable attempts to conserve water will not be implemented by Colorado. The strict administration of water already on display in Colorado increases the likelihood that the proposed measures will be implemented at least to a reasonable degree." Additional Factual Findings 21.

IV

The Special Master's task was not to draw up blueprints for New Mexico to eliminate its waste. The Master, based on all the evidence, concluded that reasonable conservation efforts in New Mexico would offset the effects of the Colorado diversion. Cf. *Wyoming* v. *Colorado*, 259 U. S., at 486 ("Our belief gathered from all the evidence is that, with the attention which rightly should be bestowed on a problem of such moment, it can be successfully solved within the limits of what is financially and physically practicable"). My examination of the testimony persuades me that that conclusion is supported by the record.

Accordingly, I respectfully dissent.

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[7] See also *id.*, at 27 ("As noted earlier, the District has a reservoir system allowing carryover from wet years to supply water during periods of shortage. Therefore, the user most affected *does* have a means of offsetting the possible shortage").

[8] The District has irrigated an average of 4,379 acres although it has rights from the Bureau of Reclamation to irrigate 7,979 acres. *Id.*, at 8. Moreover, the Master found that two individual farmers with water rights senior to the District, but whose farms are located downstream from the District, have historically used less than their decreed rights even though the supply was adequate to enable them to develop their entire acreage. See *id.*, at 6–7.

BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* COMMUNITY NUTRITION INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-458. Argued April 24, 1984—Decided June 4, 1984

To bring destabilizing competition among dairy farmers under control, the Agricultural Marketing Agreement Act of 1937 (Act) authorizes the Secretary of Agriculture (Secretary) to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. Pursuant to this authority, the Secretary issued market orders under which handlers are required to pay for "reconstituted milk" (milk manufactured by mixing milk powder with water) the minimum price for Class II milk (raw milk used to produce such products as dry milk powder) rather than the higher price covering Class I milk (raw milk processed and bottled for fluid consumption). The orders assume that handlers will use the reconstituted milk to manufacture surplus milk products, but for any portion of reconstituted milk not so used handlers must make a "compensatory payment" equal to the difference between Class I and Class II milk product prices. Respondents—three individual consumers of fluid dairy products, a handler regulated by the market orders, and a nonprofit organization—brought suit in Federal District Court, contending that the compensatory payment requirement makes reconstituted milk uneconomical for handlers to process. The District Court held, *inter alia*, that the consumers had no standing to challenge the orders. The Court of Appeals disagreed, holding that the consumers had suffered injury-in-fact, their injuries were redressable, and they were within the zone of interests protected by the Act, and that the Act's structure and purposes did not reveal the type of "clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review."

Held: The individual consumers may not obtain judicial review of the milk market orders in question. Pp. 345-353.

(a) It is clear from the structure of the Act that Congress intended that judicial review of market orders ordinarily be confined to suits by handlers in accordance with the provisions of the Act expressly entitling them to such review in a federal district court after exhausting their administrative remedies. Allowing consumers to sue the Secretary would severely disrupt the Act's complex and delicate administrative scheme. Pp. 345-348.

(b) The presumption favoring judicial review of administrative action does not control in cases such as this one, where the congressional intent to preclude consumer suits is "fairly discernible" in the detail of the legislative scheme. The Act contemplates a cooperative venture among the Secretary, producers, and handlers; consumer participation is not provided for or desired under that scheme. *Stark* v. *Wickard*, 321 U. S. 288, distinguished. Pp. 348–352.

225 U. S. App. D. C. 387, 698 F. 2d 1239, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except STEVENS, J., who took no part in the decision of the case.

Kathryn A. Oberly argued the cause for petitioners. With her on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *Leonard Schaitman*.

Ronald L. Plesser argued the cause for respondents. With him on the brief were *Janie A. Kinney, Alan R. Schwartz, William B. Schultz*, and *Alan B. Morrison*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether ultimate consumers of dairy products may obtain judicial review of milk market orders issued by the Secretary of Agriculture (Secretary) under the authority of the Agricultural Marketing Agreement Act of 1937 (Act), ch. 296, 50 Stat. 246, as amended, 7 U. S. C. § 601 *et seq.* We conclude that consumers may not obtain judicial review of such orders.

I

A

In the early 1900's, dairy farmers engaged in intense competition in the production of fluid milk products. See *Zuber* v. *Allen*, 396 U. S. 168, 172–176 (1969). To bring this destabilizing competition under control, the 1937 Act authorizes the Secretary to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. 7 U. S. C. § 608c. The "essential purpose [of this milk market order scheme is] to raise producer prices," S. Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers. See *Nebbia* v. *New York*, 291 U. S. 502, 517–518 (1934).

Under the scheme established by Congress, the Secretary must conduct an appropriate rulemaking proceeding before issuing a milk market order. The public must be notified of these proceedings and provided an opportunity for public hearing and comment. See 7 U. S. C. § 608c(3). An order may be issued only if the evidence adduced at the hearing shows "that [it] will tend to effectuate the declared policy of this chapter with respect to such commodity." 7 U. S. C. § 608c(4). Moreover, before any market order may become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the affected dairy producers in the region. 7 U. S. C. §§ 608c(8), 608c(5)(B)(i). If the handlers withhold their consent, the Secretary may nevertheless impose the order. But the Secretary's power to do so is conditioned upon at least two-thirds of the producers consenting to its promulgation and upon his making an administrative determination that the order is "the only practical means of advancing the interests of the producers." 7 U. S. C. § 608c(9)(B).

The Secretary currently has some 45 milk market orders in effect. See 7 CFR pts. 1001–1139 (1984). Each order covers a different region of the country, and collectively they cover most, though not all, of the United States. The orders divide dairy products into separately priced classes based on the uses to which raw milk is put. See 44 Fed. Reg. 65990 (1979). Raw milk that is processed and bottled for fluid consumption is termed "Class I" milk. Raw milk that is used to produce milk products such as butter, cheese, or dry milk powder is termed "Class II" milk.[1]

For a variety of economic reasons, fluid milk products would command a higher price than surplus milk products in a perfectly functioning market. Accordingly, the Secretary's milk market orders require handlers to pay a higher order price for Class I products than for Class II products. To discourage destabilizing competition among producers for the more desirable fluid milk sales, the orders also require handlers to submit their payments for either class of milk to a regional pool. Administrators of these regional pools are then charged with distributing to dairy farmers a weighted average price for each milk product they have produced, irrespective of its use. See 7 U. S. C. § 608c(5)(B)(ii).

In particular, the Secretary has regulated the price of "reconstituted milk"—that is, milk manufactured by mixing milk powder with water—since 1964. See 29 Fed. Reg. 9002, 9010 (1964); see also 34 Fed. Reg. 16548, 16551 (1969). The Secretary's orders assume that handlers will use reconstituted milk to manufacture surplus milk products. Handlers are therefore required to pay only the lower Class II minimum price. See 44 Fed. Reg. 65989, 65990 (1979). However, handlers are required to make a "compensatory payment" on any portion of the reconstituted milk that their records show has not been used to manufacture surplus milk products. 7 CFR §§ 1012.44(a)(5)(i), 1012.60(e) (1984). The compensatory payment is equal to the difference between the Class I and Class II milk product prices. Handlers make these payments to the regional pool, from which moneys are then distributed to producers of fresh fluid milk in the region where the reconstituted milk was manufactured and sold. § 1012.71(a)(1).

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[1] Under many orders, milk is divided into three classes. For purposes of this case, however, all milk other than milk used for fluid purposes is referred to as Class II milk.

B

In December 1980, respondents brought suit in District Court, contending that the compensatory payment requirement makes reconstituted milk uneconomical for handlers to process.[2] Respondents, as plaintiffs in the District Court, included three individual consumers of fluid dairy products, a handler regulated by the market orders, and a nonprofit organization. The District Court concluded that the consumers and the nonprofit organization did not have standing to challenge the market orders. In addition, it found that Congress had intended by the Act to preclude such persons from obtaining judicial review. The District Court dismissed the milk handler's complaint because he had failed to exhaust his administrative remedies.

The Court of Appeals affirmed in part and reversed in part, and remanded the case for a decision on the merits. 225 U. S. App. D. C. 387, 698 F. 2d 1239 (1983). The Court of Appeals agreed that the milk handler and the nonprofit organization had been properly dismissed by the District Court. But the court concluded that the individual consumers had standing: they had suffered an injury-in-fact, their injuries were redressable, and they were within the zone of interests arguably protected by the Act. The Court also concluded that the statutory structure and purposes of the Act did not reveal "the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review." *Id.*, at 400, and n. 75, 698 F. 2d, at 1252, and n. 75. The Court of Appeals expressly refused to follow the decision of the Ninth Circuit in *Rasmussen* v. *Hardin*, 461 F. 2d 595, cert. denied *sub nom. Rasmussen* v. *Butz*, 409 U. S. 933 (1972), which had held consumers precluded by statute from seeking judicial review.

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[2] Prior to filing suit, respondents petitioned the Secretary to hold a rulemaking hearing to amend the market orders so that reconstituted milk would no longer be subject to the compensatory payment rule. See 44 Fed. Reg. 65989 (1979). The Secretary published a Notice of Request and asked for comments. *Ibid.* Subsequently, the Secretary published a preliminary impact analysis of the proposal and invited comments. See 45 Fed. Reg. 75956 (1980). In April 1981, after respondents had filed suit in the District Court, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act. See App. 57–63. The portion of respondents' complaint challenging the Secretary's inaction on their rulemaking request was held moot by the Court of Appeals. 225 U. S. App. D. C. 387, 403, and n. 93, 698 F. 2d 1239, 1255, and n. 93 (1983). Respondents did not cross-petition for certiorari review of this issue, and we therefore have no occasion to consider it.

We granted certiorari to resolve the conflict in the Circuits. 464 U. S. 991 (1983). We now reverse the judgment of the Court of Appeals in this case.

II

Respondents filed this suit under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.* The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U. S. C. § 702, but withdraws that cause of action to the extent the relevant statute "preclude[s] judicial review," 5 U. S. C. § 701(a)(1). Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. See *Southern R. Co.* v. *Seaboard Allied Mining Corp.*, 442 U. S. 444, 454–463 (1979); *Morris* v. *Gressette*, 432 U. S. 491, 499–507 (1977); see generally Note, Statutory Preclusion of Judicial Review Under the Administrative Procedure Act, 1976 Duke L. J. 431, 442–449. Therefore, we must examine this statutory scheme "to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the [respondents] belon[g]." *Barlow* v. *Collins*, 397 U. S. 159, 173 (1970) (opinion of BRENNAN, J.,); see also *Data Processing Service* v. *Camp*, 397 U. S. 150, 156 (1970).

It is clear that Congress did not intend to strip the judiciary of all authority to review the Secretary's milk market orders. The Act's predecessor, the Agricultural Adjustment Act of 1933, 48 Stat. 31, contained no provision relating to administrative or judicial review. In 1935, however, Congress added a mechanism by which dairy handlers could obtain review of the Secretary's market orders. 49 Stat. 760. That mechanism was retained in the 1937 legislation and remains in the Act as § 608c(15) today. Section 608c(15) requires handlers first to exhaust the administrative remedies made available by the Secretary. 7 U. S. C. § 608c(15)(A); see 7 CFR §§ 900.50–900.71 (1984). After these formal administrative remedies have been exhausted, handlers may obtain judicial review of the Secretary's ruling in the federal district court in any district "in which [they are] inhabitant[s], or ha[ve their] principal place[s] of business." 7 U. S. C. § 608c(15)(B). These provisions for handler-initiated review make evident Congress' desire that *some* persons be able to obtain judicial review of the Secretary's market orders.

The remainder of the statutory scheme, however, makes equally clear Congress' intention to limit the classes entitled to participate in the development of market orders. The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers—but not consumers—are entitled to participate in the adoption and retention of market orders. 7 U. S. C. §§ 608c(8), (9), (16)(B). The Act provides for agreements among the Secretary, producers, and handlers, 7 U. S. C. § 608(2), for hearings among them, §§ 608(5), 608c(3), and for votes by producers and handlers, §§ 608c(8)(A), (9)(B), (12), 608c(19). Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process. See *Switchmen* v. *National Mediation Board*, 320 U. S. 297, 305–306 (1943); cf. *United States* v. *Erika, Inc.*, 456 U. S. 201, 208 (1982).

To be sure, the general purpose sections of the Act allude to general consumer interests. See 7 U. S. C. §§ 602(2), (4). But the preclusion issue does not only turn on whether the interests of a particular class like consumers are implicated. Rather, the preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law. See *Barlow* v. *Collins*, *supra*, at 167. The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized.

Respondents would have us believe that, while Congress unequivocally directed handlers first to complain to the Secretary that the prices set by milk market orders are too high, it was nevertheless the legislative judgment that the same challenge, if advanced by consumers, does not require initial administrative scrutiny. There is no basis for attributing to Congress the intent to draw such a distinction. The regulation of agricultural products is a complex, technical undertaking. Congress channelled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them. Had Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies provided in § 608c(15)(A) as well. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders.

Allowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme. It would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies. A handler may also be a consumer and, as such, could sue in that capacity. Alternatively, a handler would need only to find a consumer who is willing to join in or initiate an action in the district court. The consumer or consumer-handler could then raise precisely the same exceptions that the handler must raise administratively. Consumers or consumer-handlers could seek injunctions against the operation of market orders that "impede, hinder, or delay" enforcement actions, even though such injunctions are expressly prohibited in proceedings properly instituted under 7 U. S. C. § 608c(15). Suits of this type would effectively nullify Congress' intent to establish an "equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. No. 1011, 74th Cong., 1st Sess., 14 (1935); see also *United States* v. *Ruzicka*, 329 U. S. 287, 293–294, and n. 3 (1946). For these reasons, we think it clear that Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers in accordance with 7 U. S. C. § 608c(15).

III

The Court of Appeals viewed the preclusion issue from a somewhat different perspective. First, it recited the presumption in favor of judicial review of administrative action that this Court usually employs. It then noted that the Act has been interpreted to authorize producer challenges to the administration of market order settlement funds, see *Stark* v. *Wickard*, 321 U. S. 288 (1944), and that no legislative history or statutory language directly and specifically supported the preclusion of consumer suits. In these circumstances, the Court of Appeals reasoned that the Act could not fairly be interpreted to overcome the presumption favoring judicial review and to leave consumers without a judicial remedy. See 225 U. S. App. D. C., at 400, and n. 75, 698 F. 2d, at 1252, and n. 75. We disagree with the Court of Appeals' analysis.

The presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent. See, *e. g.*, *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S., at 454–463; *Schilling* v. *Rogers*, 363 U. S. 666, 670–677 (1960). The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, see, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160 (1948), or from the collective import of legislative and judicial history behind a particular statute, see, *e. g.*, *Heikkila* v. *Barber*, 345 U. S. 229 (1953). More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole. See, *e. g.*, *Morris* v. *Gressette*, 432 U. S. 491 (1977); *Switchmen* v. *National Mediation Board*, 320 U. S. 297 (1943). In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded. See *Barlow* v. *Collins*, 397 U. S., at 168, and n. 2, 175, and n. 9 (opinion of BRENNAN, J.); *Switchmen* v. *National Mediation Board*, *supra*, at 300–301; cf. *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 542 (1983).

A case that best illustrates the relevance of a statute's structure to the Court's preclusion analysis is *Morris* v. *Gressette*, *supra*. In that case, the Court held that the Attorney General's failure to object to a change in voting procedures was an unreviewable administrative determination under the Voting Rights Act of 1965. Neither the Voting Rights Act nor its legislative history said anything about judicial review. Nevertheless, the *Morris* Court concluded that the "nature of the [statutory] remedy . . . strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." *Id.*, at 501. The Court reasoned that Congress had intended the approval procedure to be expeditious and that reviewability would unnecessarily extend the period the State must wait for effecting its change. *Id.*, at 504–505. The Court also found relevant the existence of other remedies to ensure the realization of the Voting Rights Act's objectives. *Id.*, at 505–507. In these circumstances, even though proof of specific congressional intent was not "clear and convincing" in the traditional evidentiary sense, the Court unremarkably found the intent to preclude judicial review implicit in the statutory scheme.

In this case, the Court of Appeals did not take the balanced approach to statutory construction reflected in the *Morris* opinion. Rather, it recited this Court's oft-quoted statement that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). See also *Southern R. Co.* v. *Seaboard Allied Milling Corp., supra,* at 462; *Dunlop* v. *Bachowski*, 421 U. S. 560, 568 (1975). According to the Court of Appeals, the "clear and convincing evidence" standard required it to find unambiguous proof, in the traditional evidentiary sense, of a congressional intent to preclude judicial review at the consumers' behest. Since direct statutory language or legislative history on this issue could not be found, the Court of Appeals found the presumption favoring judicial review to be controlling.

This Court has, however, never applied the "clear and convincing evidence" standard in the strict evidentiary sense the

Court of Appeals thought necessary in this case. Rather, the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme." *Data Processing Service* v. *Camp*, 397 U. S., at 157. In the context of preclusion analysis, the "clear and convincing evidence" standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. That presumption does not control in cases such as this one, however, since the congressional intent to preclude judicial review is "fairly discernible" in the detail of the legislative scheme. Congress simply did not intend for consumers to be relied upon to challenge agency disregard of the law.

It is true, as the Court of Appeals also noted, that this Court determined, in *Stark* v. *Wickard*, 321 U. S. 288 (1944), that dairy producers could challenge certain administrative actions even though the Act did not expressly provide them a right to judicial review. The producers challenged certain deductions the Secretary had made from the "producer settlement fund" established in connection with the milk market order in effect at the time. "[T]he challenged deduction[s] reduce[d] *pro tanto* the amount actually received by the producers for their milk." *Id.*, at 302. These deductions injured what the producers alleged were "definite personal rights" that were "not possessed by the people generally," *id.*, at 304, 309, and gave the producers standing to object to the administration of the settlement fund. See *id.*, at 306. Though the producers' standing could not by itself ensure judicial review of the Secretary's action at their behest, see *ibid.*, the statutory scheme as a whole, the Court concluded, implicitly authorized producers' suits concerning settlement fund administration. See *id.*, at 309–310. "[H]andlers [could not] question the use of the fund, because handlers had no financial interest in the fund or its use." *Id.*, at 308. Thus, there was "no forum" in which this aspect of the Secretary's actions could or would be challenged. Judicial review of the producers' complaint was therefore necessary to ensure achievement of the Act's most fundamental objectives—to wit, the protection of the producers of milk and milk products.

By contrast, preclusion of consumer suits will not threaten realization of the fundamental objectives of the statute. Handlers have interests similar to those of consumers. Handlers, like consumers, are interested in obtaining reliable supplies of milk at the cheapest possible prices. See *Zuber* v. *Allen*, 396 U. S., at 190. Handlers can therefore be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated.[3] Indeed, as noted above, consumer suits might themselves frustrate achievement of the statutory purposes. The Act contemplates a cooperative venture among the Secretary, producers, and handlers; consumer participation is not provided for or desired under the complex scheme enacted by Congress. Consumer suits would undermine the congressional preference for administrative remedies and provide a mechanism for disrupting administration of the congressional scheme. Thus, preclusion of consumer suits is perfectly consistent with the Court's contrary conclusion concerning producer challenges in *Stark* v. *Wickard* and its analogous conclusion concerning voter challenges in *Morris* v. *Gressette*.

IV

The structure of this Act implies that Congress intended to preclude consumer challenges to the Secretary's market orders. Preclusion of such suits does not pose any threat to realization of the statutory objectives; it means only that those objectives must be realized through the specific remedies provided by Congress and at the behest of the parties directly affected by the statutory scheme.[4] Accordingly, the judgment of the Court of Appeals is reversed.

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[3] Whether handlers would pass on to consumers any savings they might secure through a successful challenge to the market order provisions is irrelevant. Consumers' interest in market orders is limited to lowering the prices charged to handlers in the hope that consumers will then reap some benefit at the retail level.

It is so ordered.

JUSTICE STEVENS took no part in the decision of this case.

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[4] The conclusion that Congress intended to preclude consumers from seeking judicial review of the Secretary's market orders avoids any pronouncement on the merits of respondents' substantive claims. Since congressional preclusion of judicial review is in effect jurisdictional, we need not address the standing issues decided by the Court of Appeals in this case. See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 456 (1974); see also *id.*, at 465, and n. 13.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-1643. Argued January 10, 1984—Decided June 5, 1984

The Motor Carrier Act of 1980 in 49 U. S. C. § 10706(b)(3) established specific guidelines to which motor-carrier rate bureaus must conform if they are to receive antitrust immunity. In 1980, the Interstate Commerce Commission (ICC) issued an interpretative ruling explaining how it planned to implement these guidelines, and proposing a new remedy to enforce rate-bureau agreements whereby the ICC would retroactively reject effective tariffs that had been submitted in substantial violation of such agreements. Alarmed by the prospect of overcharge liability that would result from such retroactive rejection of tariffs, respondents, a group of motor-carrier rate bureaus, petitioned the Court of Appeals to review the ICC's new remedy. The Court of Appeals held that the ICC lacked the power to reject effective tariffs.

Held: The proposed new remedy lies within the ICC's discretionary authority, and the ICC does not exceed its authority by nullifying effective tariffs submitted in substantial violation of rate-bureau agreements. Pp. 359–371.

(a) Title 49 U. S. C. § 10762(e), which authorizes the ICC to reject a motor-carrier tariff if it violates the statutory requirements for publishing and filing tariffs or an implementing regulation, does not confer on the ICC the broad power to nullify effective tariffs retroactively. This is indicated by § 10762(e)'s language and the structure of the ICC's remedial authority under the Interstate Commerce Act. Pp. 361–364.

(b) The ICC, however, may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals. In this case, retroactive rejection of rate-bureau tariffs is a justifiable adjunct to the ICC's express § 10762(e) rejection authority, and, to the extent there is an elaboration of that authority, it is necessary to ensure compliance with rate-bureau agreements. The rejection of effective tariffs submitted in substantial violation of such agreements simply extends the ICC's express rejection authority so that it may adequately supervise those agreements to see that they comply with the § 10706(b)(3) guidelines. The legislative history of the Motor Carrier Act of 1980 makes it clear that, beyond the bounds of antitrust immunity granted in § 10706, Congress wanted the forces of competition to determine motor-carrier tariffs, and intended that the ICC play a key role in holding carriers to the § 10706(b)(3) guidelines. And the remedy in question is a means of policing rate-bureau agreements sufficiently direct and close to the ICC's statutory mandate to warrant approval of the remedy. Pp. 364–371.

688 F. 2d 1337, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, POWELL, and STEVENS, JJ., joined, *post*, p. 371.

Carter G. Phillips argued the cause for petitioners. On the briefs were *Solicitor General Lee*, *John Broadley*, and *Lawrence H. Richmond*.

Patrick McEligot argued the cause for respondents. With him on the brief were *Bryce Rea, Jr.*, *Nelson J. Cooney*, *William Kenworthy*, *F. H. Lynch, Jr.*, *William W. Pugh*, *J. Alan Royal*, *Robert A. Wilson*, and *Curtis Wood.**

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a challenge to an effort by the Interstate Commerce Commission to create a new remedy to enforce motor-carrier rate-bureau agreements. The remedy at issue is the Commission's authority to reject effective tariffs that have been submitted in substantial violation of rate-bureau agreements. As we have recognized in the past, the Interstate Commerce Commission (Commission or ICC) has discretion to fashion remedies in furtherance of its statutory responsibilities. *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 654 (1978). Although rejection of effective tariffs is a form of remedial power not expressly delegated to the Commission, the remedy as proposed by the Commission in this case is closely and directly related to the Commission's express statutory powers and is designed to achieve objectives set for the Commission by Congress. Under these limited circumstances, we hold that the proposed remedy lies within the Commission's discretion.

**Michael Boudin*, *Stuart C. Stock*, *Albert B. Russ, Jr.*, *Harry N. Babcock*, and *Harry McCall, Jr.*, filed a brief for Aberdeen and Rockfish Railroad Co. et al. as *amici curiae* urging affirmance.

I

Motor-carrier rate bureaus are groups of motor carriers formed to negotiate collective rates. Since the Reed-Bulwinkle Act of 1948, motor carriers within the jurisdiction of the Commission have enjoyed immunity from the antitrust laws to enter into rate bureaus and to submit collective rates to the Commission. Ch. 491, 62 Stat. 472. To receive this immunity, rate bureaus must apply for Commission approval of bureau agreements, which describe the manner in which a bureau will negotiate collective tariffs. The original Reed-Bulwinkle Act gave the ICC broad discretion to determine which rate-bureau agreements were consistent with national transportation policy. 49 U. S. C. § 5 (1976 ed.). Until recently, the Commission was fairly liberal in approving rate-bureau agreements, but, in the late 1970's, the Commission began to disapprove an increasing number of agreements on the grounds that the agreements were undermining competition among motor carriers. In 1980, apparently disturbed by this abrupt shift in Commission policy but persuaded that some deregulation of motor carriers was necessary, Congress passed the Motor Carrier Act of 1980 (MCA). Pub. L. 96–296, 94 Stat. 793. The MCA in 49 U. S. C. § 10706(b)(3) establishes specific guidelines, to which rate-bureau agreements must conform if they are to receive antitrust immunity.[1] Because the MCA creates a presumption that bureau agreements meeting the requirements of § 10706(b)(3) will qualify for antitrust immunity, the Act divests the Commission of much of its discretion to approve and disapprove rate-bureau agreements. See H. R. Rep. No. 96–1069, p. 29 (1980).

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[1] The guidelines set disclosure requirements for rate agreements, sunshine rules for bureau meetings, and limitations on the issues that bureau members may discuss. 49 U. S. C. §§ 10706(b)(3)(A), (B). The most significant deregulatory aspect of the guidelines is a ban on discussions of tariffs applicable solely to individual carriers. § 10706(b)(3)(D). The scope of collective ratemaking permitted under the MCA is summarized in H. R. Rep. No. 96–1069, pp. 29–30 (1980).

This case arises out of an ICC interpretative ruling issued in 1980 explaining how the Commission planned to implement the new statutory guidelines for rate-bureau immunity. *Motor Carrier Rate Bureaus—Implementation of P. L. 96–296*, 364 I. C. C. 464 (1980). For the most part, this interpretative ruling presented the Commission's views on the substance of the new legislation, and established procedures whereby rate bureaus could submit existing agreements to the Commission for approval under the new standards. Before concluding, however, the ruling also addressed a problem the Commission had faced in regulating rate-bureau agreements even before Congress in 1980 amended the Reed-Bulwinkle Act: "the lack of definite remedies for proven rate bureau violations." *Id.*, at 499. The Commission announced its intention to fashion the following new remedy:

> "In addition to the possible remedy of withdrawal of immunity for serious and continuing violations, we proposed to adopt a standard providing that proof of significant violations of an approved agreement will result in tariff rejection. Allegations of lesser violations would subject the tariff item to suspension or investigation." *Ibid.*

The Commission subsequently explained how its new remedy would be implemented.[2] The Commission intends to use the remedy to discipline motor carriers for substantial bureau agreement violations, such as unauthorized collusion or illegal bureau pressure on independent carriers. Brief for

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[2] The Commission explicated its proposed remedy in orders issued on January 28, 1981, and April 27, 1981. See Record 375, 381; *Motor Carrier Rate Bureaus—Implementation of P. L. 96–296*, 364 I. C. C. 921, 927.

Petitioners 24. Interested parties—for instance, shippers or other carriers—may file complaints of such violations with the Commission. Upon receiving such a complaint, the Commission's Office of Consumer Protection will investigate the allegations, and, if a serious violation is discovered, the Office will refer the matter to the Commission for a full hearing. If the hearing confirms that a serious violation has occurred, the Commission has the authority to reject the affected tariffs. The Commission's decision to reject is reviewable in federal court. *Motor Carrier Rate Bureaus—Implementation of PL 96-296*, 364 I. C. C. 921, 926 (1981).

Rejection of an effective tariff applies retroactively, and can have serious consequences for affected motor carriers. Rejection renders the tariff void *ab initio*. Brief for Petitioners 7. As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the period during which motor carriers charged the rejected tariff. Under 49 U. S. C. § 11705(b)(1), shippers that were charged the rejected tariff can then bring actions to recover the "overcharge," which is the amount by which the rejected tariff exceeded the prior tariff.

Alarmed by the prospect of overcharge liability, respondents, a group of motor-carrier rate bureaus, petitioned the United States Court of Appeals for the Eleventh Circuit to review the Commission's new remedy. The Eleventh Circuit accepted respondents' argument that the Commission lacks the power to reject effective tariffs. *American Trucking Assn., Inc.* v. *United States*, 688 F. 2d 1337 (1982). Because the Fifth Circuit previously had found the Commission to possess authority to reject effective tariffs in a different context, *Aberdeen & Rockfish R. Co.* v. *United States*, 682 F. 2d 1092 (1982), cert. pending, No. 82-707, we granted certiorari in this case to examine the Commission's powers to reject effective tariffs. 462 U. S 1130 (1983). We now reverse the judgment of the Eleventh Circuit.

II

The issue before us is narrow. Most aspects of the Commission's authority to supervise motor-carrier rate-bureau agreements are not seriously challenged. For example, the Commission undisputedly has the power to terminate a rate-bureau agreement if the agreement itself fails to meet MCA guidelines or if bureau members persist in filing tariffs in violation of the terms of the agreement. 49 U. S. C. § 10706(f). Moreover, during the 30 days before a tariff proposed by a bureau member goes into effect, the Commission clearly has authority to reject the proposal if it was submitted in violation of a rate-bureau agreement.[3] 49 U. S. C.

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[3] Respondents contest this point. In an argument repudiated by the Eleventh Circuit, *American Trucking Assn., Inc.* v. *United States*, 688 F. 2d 1337, 1353 (1982), respondents contend that under § 10762(e) the Commission is empowered to reject a tariff only when the application therefor contains a formal, as opposed to a substantive, defect. We decline to read § 10762(e) so narrowly. As the District of Columbia Circuit noted in a similar context: "[Rejection] is not limited to defects of form. It may be used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." *Municipal Light Boards* v. *FPC*, 146 U. S. App. D. C. 294, 299, 450 F. 2d 1341, 1346 (1971), cert. denied, 405 U. S. 989 (1972); see also *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F. 2d 1374, 1377 (CA11 1982) (amended opinion); cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 347 (1956).

Respondents also argue that, even if § 10762(e) extends to substantive defects, it should not apply to violations of rate-bureau agreements because the ICC's sole remedy for such violations is termination of agreement approval under 49 U. S. C. § 10706(f). While the ICC has the option to terminate agreement approval under § 10706(f), see *supra* this page, Congress has expressly provided that powers enumerated in the Interstate Commerce Act do not preclude the Commission from taking other actions consistent with its statutory duties. § 10321(a). Since the Commission has a statutory duty to supervise rate-bureau agreements, see *supra*, at 356–357, we agree with the Eleventh Circuit that it is a perfectly reasonable exercise of administrative authority for the Commission to

§ 10762(e). In addition, if the Commission suspects that a proposed tariff has been submitted in violation of a rate-bureau agreement but no violation is immediately evident, the Commission may postpone the tariff's effective date for up to seven months, and conduct an investigation into its lawfulness. § 10708. If the investigation uncovers a rate-bureau agreement violation before the suspension period expires, the Commission may reject the proposed tariff. Furthermore, the Commission may conduct an investigation into a tariff's lawfulness at any time after it has gone into effect, and, if the tariff is found to have been the product of a bureau agreement violation, the Commission has authority to cancel the tariff and require that a reasonable and nondiscriminatory rate apply in the future. § 10704(b)(1). Whenever the Commission finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow. Finally, the Commission has authority to impose civil and criminal penalties on rate agreement violators. §§ 11901(b), 11914(b).

Our sole concern in this case is whether, in addition to the remedial powers listed above, the Commission has the authority to reject retroactively a tariff submitted in substantial violation of a rate-bureau agreement once that tariff has gone into effect.[4] As a practical matter, the question is whether motor carriers that provide services based on effec-

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refuse to accept proposed tariffs submitted in violation of rate-bureau agreements. 688 F. 2d, at 1352–1353; cf. *Board of Trade* v. *ICC*, 646 F. 2d 1187, 1193 (CA7 1981) (Commission is obliged to reject such tariffs).

[4] Prior to 1979, the Commission had no need to reject effective tariffs, because the Commission's staff examined every filing prior to the effective date of the proposed tariff and, if an obvious defect was discovered, the tariff was rejected immediately. In 1979, however, budgetary cutbacks forced the Commission to abandon its comprehensive examination program. Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are permitted to go into effect. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, at 1376–1377.

tive tariffs submitted in substantial violation of rate-bureau agreements can be held liable to injured parties for the entire amount by which their rates exceed the previous rates, and not just for the damages caused by the violation.[5]

A

Since the Commission styled its new remedy as a rejection power, the most obvious source of the authority claimed by the Commission is 49 U. S. C. § 10762(e), which provides:

> "The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section."

At least superficially, § 10762(e) supports the Commission's exercise of the power it asserts in this case. The subsection authorizes the rejection of tariffs, and does not distinguish between proposed and effective tariffs. Inasmuch as Congress in other contexts has expressly limited aspects of the Commission's enforcement powers to proposed tariffs, *e. g.*, 49 U. S. C. § 10708(a)(1) (suspension of proposed rates), the absence of limitation in § 10762(e) suggests that the Commission may reject both proposed and effective tariffs. However, the language of § 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA), as amended, 49 U. S. C. § 10101 *et seq.*, persuade us that Congress could not have meant § 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

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[5] The difference can be significant for carriers. In suits under 49 U. S. C. § 11705(b)(3), damages awards are limited to the extent to which an unlawful tariff was unreasonable or discriminatory. See *Spencer Plant Foods, Inc.* v. *Atlantic Coast Line R. Co.*, 302 I. C. C. 799, 800 (1958); *Boren-Stewart Co.* v. *Atchison, T. & S. F. R. Co.*, 196 I. C. C. 120, 125–126 (1933). Accordingly, if a motor carrier submits a large tariff increase in violation of its rate-bureau agreement, but the increase is neither unreasonable nor discriminatory, application of the Commission's proposed remedy will expose the carrier to liabilities greatly in excess of the damages available under § 11705(b)(3).

To begin with, the term "reject" connotes a refusal to receive at the threshold. To interpret the power to reject as a license to revoke a tariff that the Commission has already accepted would be contrary to the plain language of the subsection.[6] For this reason, the District of Columbia Circuit has concluded that rejection provisions analogous to § 10762(e) do not extend to tariffs that have gone into effect. In a case involving the former Federal Power Commission's rejection authority, Judge Leventhal likened rejection to "a motion to dismiss on the face of the pleading," and declared rejection to be "'a peremptory form of response to filed tariffs.'" *Municipal Light Boards* v. *FPC*, 146 U. S. App. D. C. 294, 299, 450 F. 2d 1341, 1346 (1971) (quoting F. Welch, Cases and Text on Public Utility Regulation 581 (1961)), cert. denied, 405 U. S. 989 (1972). In a subsequent case dealing with the former Civil Aeronautics Board's rejection authority, another appellate panel approved of Judge Leventhal's analysis and concluded: "[R]ejection is a regulatory device properly used only *prior* to a tariff's effective date." *Delta Air Lines, Inc.* v. *CAB*, 177 U. S. App. D. C. 100, 121, 543 F. 2d 247, 268 (1976) (emphasis in original).

A further reason to believe that § 10762(e) does not extend to effective tariffs is the difference between the procedural safeguards incorporated into § 10762(e) and those that Congress built into remedies clearly designed to reach effective tariffs. On its face and as applied by the Commission, § 10762(e) offers affected carriers no opportunity to challenge a decision to reject. Rejection is peremptory, and the carrier's only recourse is to submit a corrected tariff. On the other hand, § 10704(b), which deals with the Commission's authority to cancel effective tariffs and to prescribe new rates for the future, provides that the Commission must conduct a full hearing before taking any action. It would be bizarre, to say the least, to interpret § 10762(e) to give the Commission peremptory authority to void effective rates retroactively, when § 10704(b) places procedural constraints on the Commission's authority to take the less drastic step of modifying effective tariffs prospectively.

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[6] Section 10762(e)'s placement within the ICA lends credence to the view that rejection is a summary power to be used at the outset of the rate-filing process. Section 10762(e) appears in a section regulating the manner in which new tariffs are to be filed with the Commission prior to their effective date. By authorizing the Commission to "reject a tariff . . . if that tariff violates this section," § 10762(e) seems focused on the Commission's authority to turn away a tariff submission at the time of filing.

Similarly, reading § 10762(e) to give the Commission unbridled discretion to reject effective tariffs at any time would undermine restraints placed by Congress on the Commission's power to suspend a proposed tariff pending investigation. See § 10708; *supra*, at 360. The Commission's power to suspend is limited to the seven months after the proposed tariff's effective date, and final action in a suspension-investigation proceeding can be taken only after a full hearing. §§ 10708(a)(2), (b). Were we to read § 10762(e) as broadly as the Commission proposes, the temporal and procedural constraints of § 10708 would be nugatory, since the Commission could rely on its rejection powers to void a regulation at any time and without any procedural safeguards.

The language of § 10762(e) is admittedly ambiguous, and, in the ordinary course, we might defer to the Commission's view that the subsection should be given a liberal interpretation. However, in this case, the Commission's interpretation is unsupported by a natural reading of the provision and inconsistent with the remedial structure established by Congress.[7] Under these circumstances, we cannot defer to the Commission's interpretation, and we accept the view of the Eleventh Circuit that § 10762(e) does not license the Commission to reject effective tariffs.

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[7] Previous decisions of this Court coupled with past rulings of the Commission cast further doubt on the proposition that § 10762(e) authorizes the Commission to nullify any effective tariff containing either

B

Although we conclude that § 10762(e) does not bestow on the Commission a general authority to reject effective tariffs, this conclusion does not resolve the dispute. The Commission's authority under the Interstate Commerce

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substantive or formal defects. In *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.*, 235 U. S. 371 (1914), and again in *Davis* v. *Portland Seed Co.*, 264 U. S. 403 (1924), we stressed the importance of common carriers' being able to rely on effective tariffs on file with the Commission. As the Commission itself once recognized, these cases "strongly sugges[t] that recovery for a tariff's failure to comply with a formal requirement may be limited to the amount of damage suffered by the shipper." Brief for Federal Respondents in Opposition in *Nitrochem, Inc.* v. *ICC*, O. T. 1981, No. 81–1205, p. 6. Reading § 10762(e) to authorize retroactive rejection of effective tariffs would significantly undermine the repose that carriers have traditionally been permitted to enjoy once their tariffs have been accepted by the Commission.

Indeed, until the recent past, the Commission generally shared the view that, though a tariff might have been submitted in a technically deficient manner, the tariff was not a nullity and a shipper's recovery was limited to actual damages. See *Boren-Stewart Co.* v. *Atchison, T. & S. F. R. Co.*, 196 I. C. C. 120 (1933); see also *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R. Co.*, 277 I. C. C. 641, 644 (1950) ("Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender"). The few instances in which the Commission has nullified effective tariffs have involved cases of tariffs mistakenly filed with the Commission by carriers outside the Commission's jurisdiction. See *Acme Fast Freight, Inc., et al., Common Carrier Application*, 17 M. C. C. 549 (1939), sustained, 30 F. Supp. 968 (SDNY), aff'd, 309 U. S. 638 (1940) *(per curiam); Mercer Valley R. Co.* v. *Pennsylvania R. Co.*, 69 I. C. C. 233 (1922). Only in 1978 did the Commission propose to nullify an effective tariff of a carrier within the Commission's jurisdiction. *National Assn. of Specialized Carriers, Inc., Agent-Show Cause and Strike Order*, I. C. C. Order No. 36870 (Apr. 11, 1978). While an agency is free to change its mind about the meaning of an enabling Act, that the Commission has so long adhered to a narrow view of its rejection authority has some probative value for our decision today.

Act is not bounded by the powers expressly enumerated in the Act. 49 U. S. C. § 10321(a). As we have held in the past, the Commission also has discretion to take actions that are "'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power.'" *Trans Alaska Pipeline Rate Cases*, 436 U. S., at 655 (quoting *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500, 514 (1976)). We have recognized that the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals. In this case, the Commission argues that the retroactive rejection of rate-bureau tariffs is simply an adjunct to the Commission's § 10762(e) rejection authority, and that, to the extent that there is an elaboration on that authority, it is necessary to ensure compliance with rate-bureau agreements. In these narrow circumstances, we agree.

The doctrine of ICC discretion arose out of a recognition that, since drafters of complex ratemaking statutes like the ICA neither can nor do "include specific consideration of every evil sought to be corrected," the absence of express remedial authority should not force the Commission "to sit idly by and wink at practices that lead to violations of [ICA] provisions." *American Trucking Associations, Inc.* v. *United States*, 344 U. S. 298, 309–310, 311 (1953). The doctrine originated in cases in which we accorded the Commission latitude to interpret its statutory powers in a reasonable manner. See, *e. g.*, *American Trucking Associations, Inc.* v. *United States, supra;* cf. *Permian Basin Area Rate Cases*, 390 U. S. 747, 774–777 (1968) (comparable construction of the authority of the FPC under the Natural Gas Act). More recently, however, we have applied the doctrine to sustain the Commission's efforts to place reasonable conditions on its acceptance of proposed tariffs. For instance, in *United States* v. *Chesapeake & Ohio R. Co.*, *supra*, we upheld a decision by the Commission to approve tariff increases only on the condition that carriers spend a specific portion of the increase on capital improvements and deferred maintenance. Although the ICA provides the Commission no express authority to dictate the manner in which carriers expend their revenues, we held that the Commission's conditions of approval were sufficiently tied to the ICA's statutory goal of safeguarding the Nation's transportation system to withstand judicial review.

In *Trans Alaska Pipeline Rate Cases*, *supra*, this Court again addressed the Commission's discretionary authority to condition tariff approval in a manner reasonably tied to statutory objectives. In that case, the Commission had extracted from pipeline owners, in exchange for approval of a tentative tariff schedule, the owners' promise to refund whatever portion of the tentative rates the Commission subsequently found to be unreasonable. Claiming this action was unauthorized under the ICA, the pipeline owners argued that the Commission was required to choose between either suspending the proposed tariffs for an investigation into their reasonableness or approving the tariffs subject to prospective modification at some future date. Even though we agreed that the Commission lacks explicit authority to order refunds on tariffs that have gone into effect, we declined to interpret the ICA as placing the Commission in the dilemma posited by the pipeline owners. Suspension would have delayed the opening of the Alaska pipeline, whereas unconditional approval of the proposed rates might have unjustly enriched the pipeline owners. Since both alternatives were inconsistent with the policies underlying the ICA, we concluded that the Commission was justified in transcending its explicit remedial authorities and conditioning the approval of the Alaska-pipeline tariffs on a commitment to refund unreasonably high rates.

The remedial authority at issue in this case consists of another effort by the Commission to place a condition on the approval of a proposed tariff. In effect, the Commission has informed all motor carriers submitting proposed tariff increases that the Commission will approve those increases subject to the condition that the carriers may be called upon to disgorge the increases if the Commission later discovers that the tariffs were submitted in substantial violation of a rate-bureau agreement. This retroactive rejection of tariffs is akin to the remedial authorities that Congress expressly delegated the Commission. A primary responsibility of the Commission is to supervise and approve tariffs submitted under the ICA. Under 49 U. S. C. § 10762(e), the Commission is expressly empowered to reject tariffs prior to their effective date. The Commission's proposal to reject effective tariffs submitted in substantial violation of rate-bureau agreements simply extends the Commission's express rejection authority so that the Commission may adequately supervise motor-carrier rate-bureau agreements. The question presented by this case is whether fashioning this remedy falls within the Commission's authority to modify express remedies in order to achieve legitimate statutory purposes. To lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate.

The Motor Carrier Act of 1980 presents a statutory basis for the Commission to approve motor-carrier tariffs on the condition that the Commission may later nullify increases found to have been submitted in substantial violation of rate-bureau agreements. The legislative history of the Act is clear that, beyond the bounds of immunity granted in § 10706(b)(3), Congress wanted the forces of competition to determine motor-carrier tariffs.[8] The function of the Commission's proposed remedy is to ensure that motor carriers collude only as permitted by the MCA guidelines. The conditional approval of motor-carrier tariffs with concomitant threat of overcharge liability provides strong incentives for motor carriers to abide by the terms of their rate-bureau agreements. Since § 10706(b)(3) prescribes the guidelines for rate-bureau agreements, this remedy encourages motor carriers to limit their collective activities to the areas that Congress described in the statutory guidelines.

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[8] See H. R. Rep. No. 96–1069, pp. 27–28 (1980); 126 Cong. Rec. 7777 (1980) (statement of Sen. Cannon).

There can be little doubt that Congress intended for the Commission to play a key role in holding carriers to the § 10706(b)(3) guidelines. Section 10706(b)(3), like the Reed-Bulwinkle Act before it, grants motor carriers immunity from the antitrust laws. To some degree, § 10706(b)(3) is self-enforcing, because bureau members will strive to stay within its guidelines in order to avoid the antitrust liability that transgressions could precipitate. However, the procedures governing the administration of § 10706(b)(3) demonstrate that Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of the guidelines. It is, after all, the Commission that decides which bureau agreements conform to the dictates of § 10706(b)(3). 49 U. S. C. § 10706(b)(2). It is the Commission that is empowered to terminate or suspend rate-bureau agreements. §§ 10706(f), (h). And, it is the Commission that may impose conditions on rate-bureau agreements in order to further National Transportation Policy. § 10706(b)(2).[9]

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[9] As respondents stress, Congress passed § 10706(b)(3) partially to restrain the Commission from exercising too much discretion in dictating the terms of rate-bureau agreements. See *supra*, at 356–357. However, the limitations on the Commission's power embodied in the MCA are all directed at the Commission's substantive authority to set the criteria for acceptable rate-bureau agreements. No provision of the Act limits the Commission's remedial authority to deal with motor carriers that operate in clear violation of approved agreements. To the contrary, the House Report on the MCA expressly states that the legislation will not diminish the Commission's enforcement authority. See H. R. Rep. No. 96–1069, *supra*, at 40.

More difficult to answer is the question whether the Commission's conditional approval of motor-carrier tariffs is a means of policing rate-bureau agreements sufficiently direct and close to the Commission's statutory mandate to warrant approval. The Commission offers two imbricated justifications for its new remedy. First, the Commission argues that, without the potential for overcharge damages awards, shippers will not have sufficient incentive to report rate-bureau violations to the Commission or to file antitrust suits on their own. Second, the Commission claims that it must have the power to approve bureau tariffs conditionally because the other remedial tools at its disposal are inadequate to enforce compliance with bureau agreements. In the Commission's view, the threshold remedies of peremptory rejection of proposed rates and of suspension of rates pending investigation are inadequate to cope with substantial violations, which are typically shrouded in secrecy and undetectable on the face of a tariff proposal. If a substantial bureau violation comes to light once a tariff is in effect, the Commission's only statutory remedy is to declare the tariff in violation of the ICA and to prescribe a new rate for the future. Admittedly, such a declaration and prescription will render the offending carriers liable for damages actions brought by injured shippers, but the size of the damages awards would, in the Commission's opinion, provide insufficient incentive to keep carriers faithful to their bureau agreements.[10] Similarly, the Commission maintains that its penalty authority is too weak to guarantee compliance with bureau agreements.[11]

But the very potency of overcharge is what makes the nullification of motor-carrier tariffs a troubling exercise of Commission authority. For a motor carrier, overcharge liability may be ruinous. Overcharge awards can easily surpass the damages for which carriers have historically been liable under § 11705(b)(3), and may even exceed the treble damages to which the carriers are vulnerable under the antitrust laws. Indeed, the effect of the Commission's proposed new remedy is to convert the ICC into the Federal Government's most potent enforcer of the antitrust laws, albeit for the limited purpose of ensuring compliance with the guidelines of § 10706(b)(3).[12]

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[10] See n. 5, *supra.*

[11] In another field, the inadequacy of an agency's express statutory authority might be seen as evidence that Congress intended for the agency not to possess more adequate powers. However, this inference cannot be drawn in this area because 49 U. S. C. § 10321(a) provides: "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle."

Nevertheless, we agree with the Commission that its new remedy is a justifiable adjunct to its express statutory mandate. The nullification of effective tariffs submitted in violation of rate-bureau agreements is directly aimed at ensuring that motor carriers comply with the guidelines established by Congress in the MCA. Consistent with congressional intent, the remedy stimulates competitive pricing beyond the bounds of the motor-carrier immunity granted in § 10706(b)(3). Moreover, the structure of the MCA and its legislative history establish that Congress expected that the Commission would play a key role in holding carriers to the § 10706(b)(3) guidelines, and it is within the Commission's discretion to decide that the only feasible way to fulfill its mandate is to condition approval of motor-carrier tariffs on compliance with approved rate-bureau agreements.

Our concern over the harshness of this new remedial authority is lessened by the significant steps the Commission has taken to ensure that the penalty will not be imposed unfairly. Under the Commission's proposed scheme, effective tariffs will be nullified only upon findings of substantial violations of rate-bureau agreements. The guidelines for antitrust immunity set out in § 10706(b)(3) are of such a nature that carriers who submit tariffs in substantial violation of agreements will be aware of their transgressions. So concerns that the new remedy will be used to penalize carriers that inadvertently transgress rate-bureau agreements are largely unfounded. Moreover, the risk that the Commission will err in finding substantial violations is lessened by the procedural safeguards of full hearings and judicial review that are built into the Commission's proposal. Finally, the Commission has reserved the discretion to withhold the sanction of retroactive rejection, should the circumstances of a violation counsel lenity.[13]

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[12] Under some circumstances, overcharge liability might exceed the maximum penalty for criminal violations of the antitrust laws, which is $1 million. See 15 U. S. C. § 1 *et seq.*

III

For the foregoing reasons, we conclude that the Commission does not exceed its authority by nullifying effective motor-carrier tariffs submitted in substantial violation of rate-bureau agreements. Accordingly, the judgment of the Eleventh Circuit is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS join, dissenting.

This case presents the question whether the Interstate Commerce Commission (Commission) may nullify a motor carrier tariff at any time after it has become effective. Such nullification renders the carrier liable to shippers for the amount by which the rejected rate exceeds the last rate the carrier has lawfully filed. The Court quite correctly reasons that 49 U. S. C. § 10762(e) does not authorize the Commission to reject effective tariffs. See *ante*, at 361–364. Reading § 10762(e) to authorize such action would indeed give the Commission an "unbridled discretion" that Congress did not intend it to have. See *ante*, at 363. However, after having correctly rejected § 10762(e) as a basis for the proposed rejection power, the Court then mysteriously concludes that the power is within the Commission's "discretionary power" to ensure that shippers adhere strictly to their approved rate bureau agreements. *Ante*, at 367. I frankly do not understand how this alternative "discretionary power" rationale better reins in the Commission's discretion. Accordingly, I dissent.

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[13] Although it is difficult to know how the Commission will exercise this discretion, in the only analogous case to date, which happened to involve a railroad rate bureau, the Commission decided that the circumstances of the rate-bureau agreement violation did not warrant rejection. See *Transit on Wheat Between Reshipping Point and Destination*, 365 I. C. C. 890 (1982).

I

The Court starts with the proposition that the enumeration of certain Commission powers in the Interstate Commerce Act, as amended, 49 U. S. C. § 10101 *et seq.*, does not necessarily exclude others not expressly listed. See *ante*, at 364–365. I have no quarrel with that proposition. Like most agencies, the Commission is authorized to prescribe regulations to carry out its statutory duties. 49 U. S. C. § 10321(a). The Commission's efforts to interpret and implement the tariff filing provisions therefore deserve considerable judicial deference. See *American Trucking Associations, Inc.* v. *United States*, 344 U. S. 298, 311 (1953); see generally *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500 (1976); *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631 (1978). But this rule of deference has never been equated with a "discretionary power" in the Commission to place conditions on its acceptance of proposed tariffs. I think the Court misreads its prior cases in finding such authority today.

The Court did not, as today's opinion asserts, approve the concept of "discretionary power" of the Commission in *United States* v. *Chesapeake & Ohio R. Co., supra.* In that case, the Commission proposed to allow an immediate rate increase on the condition that the benefited rail carriers devote to certain designated uses the additional revenues earned during the 7-month period the rates would otherwise have been suspended. Though the Commission had no express power to place conditions on the use of these revenues, the Court concluded that qualifying immediate acceptance in this manner was "a legitimate, reasonable, and direct adjunct [of] the Commission's explicit statutory power to suspend rates pending investigation." 426 U. S., at 514. Delaying implementation of the new tariffs would only have frustrated Congress' desire to improve the condition of the railroads. Thus, the Commission's decision to condition its acceptance on use of the moneys earned during the 7-month suspension period was "an alternative tailored far more precisely to the particular circumstances presented." *Ibid.*

Nor did the *Trans Alaska Pipeline Rate Cases*, *supra*, approve any principle of inherent Commission authority. In these cases, the Commission proposed to allow the owners of the Trans Alaska Pipeline System to implement immediately rates on condition that the carriers refund any amounts collected during the period the rates would otherwise have been suspended and later determined to be unlawful. The Court sustained the Commission's efforts, finding that the condition was a power "'ancillary' to [the] suspension power" and that immediate implementation would further Congress' policy of early development and delivery of oil from Alaska's North Slope. 436 U. S., at 654–655. Again, the Court deferred to the Commission's efforts, but only because the Commission had implemented an alternative that was carefully tied to the statutory suspension power and narrowly tailored to the particular circumstances presented. *Id.*, at 655.

Thus, *Chesapeake & Ohio R. Co.* and *Trans Alaska Pipeline Cases* support neither the remedy the Commission has proposed to implement here nor the power on which the Court suggests that it can be based. In contrast to the conditions imposed in those cases, the Commission's proposed retroactive rejection power is not a "direct adjunct" of the statutory suspension power. The Commission claims the power retroactively to reject a tariff at *any* time, not just during the 7-month period it could otherwise have suspended and investigated the proposed rates. More importantly, neither case even mentions the principle of "discretionary power" on which the Court today relies. Rather, the Court in both cases gave traditional judicial deference to the Commission's use of its express statutory powers. The idea of a boundless "discretionary power" was simply not considered.

II

Perhaps recognizing the open-ended character of the regulatory principle it announces, the Court suggests that two limiting criteria will cabin the Commission's discretionary authority. First, the Court proposes that the authority must be exercised to further a specific statutory mandate. *Ante*, at 367. Second, the Court proposes that the exercise of the authority must be directly and closely tied to that mandate. *Ibid.* Whatever the merits of these criteria, they definitely are not satisfied in the circumstances of this case.

A

The Court points to the Motor Carrier Act of 1980, Pub. L. 96–296, 94 Stat. 793, as the statutory mandate that the Commission's retroactive rejection authority is being used to further. According to the Court, the Congress enacting this legislation left to the Commission discretionary authority to fashion remedial powers necessary to ensure that shippers adhere strictly to their approved rate bureau agreements. *Ante*, at 368. However, an examination of the history behind this legislation unambiguously refutes this view.

Prior to the enactment of the Motor Carrier Act, the Commission had been attempting to curtail drastically the motor carriers' opportunities to engage in collective ratemaking. In one rulemaking proceeding, for example, the Commission had proposed exactly what Congress itself had earlier rejected—namely, to apply to motor carrier rate bureaus the severe restrictions on collective ratemaking authority statutorily imposed on rail rate bureaus by the Railroad Revitalization and Regulatory Reform Act of 1976. See 43 Fed. Reg. 1809 (1978). In another instance, the Commission had proposed to review every individual ratemaking agreement to determine if continued approval would be warranted under new Commission standards. See *id.*, at 1666. And in 1979, when budgetary constraints and increased filings caused it to change its tariff monitoring practices, the Commission twice asserted that retroactive tariff rejection was necessary to combat anticompetitive practices in the motor carrier industry. See 44 Fed. Reg. 58511, 58512, 60122, 60123–60124 (1979). The 1980 Congress shared the Commission's desire to increase competition in the motor carrier industry, but it rejected the Commission's attempts to create that competition on its own initiative.

Well aware that the "Commission ha[d] recently embarked upon a series of reviews of rate bureau agreements to determine whether they should be continued and, if so, under what conditions," H. R. Rep. No. 96–1069, p. 27 (1980), Congress made clear that it wanted to *reduce* the Commission's regulatory authority over motor carrier rate bureau practices.

> "[I]n order to reduce the uncertainty felt by the Nation's transportation industry, the . . . Commission [is] given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the . . . Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act . . . and other legislation enacted by Congress." 94 Stat. 793.

Senator Cannon, one of the sponsors of the 1980 Act, explained:

> "[L]egislation is desperately needed to clarify the existing regulatory uncertainty that plagues the industry and those who care about it. . . . This bill gives specific direc-

> tion to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated." 126 Cong. Rec. 7777 (1980).

Representative Harsha gave a similar explanation to his colleagues in the House:

> "For too long Congress has basically been on the sidelines, while the Interstate Commerce Commission exercised unduly wide discretion in regulating the Nation's motor carrier industry. . . . [I]n the past several years, it has made changes in the regulatory system on its own initiative[,] in the absence of congressional guidance, if not consultation.
>
> . . . . .
>
> "It is not the intent of the committee, and I am certain that it is not the will of Congress, that while we reduce the amount of needless regulation in the trucking industry, we increase the regulatory powers of ICC bureaucrats.
>
> "Therefore, [the bill] give[s] clear guidelines to the ICC on how to administer the law. In so doing, the committee expects the Commission to stay within the explicit powers invested by the new statute. . . ." *Id.*, at 15585.

These sentiments were echoed in the Committee Reports of each congressional chamber. See H. R. Rep. No. 96–1069, *supra*, at 29; S. Rep. No. 96–641, p. 31 (1980).

To be sure, Congress wanted the Commission to "retain and enforce existing regulations as to the processing of loss, damage, and overcharge claims . . . ." H. R. Rep. No. 96–1069, *supra*, at 40. But Congress expressed a strong disapproval of all of the Commission's pre-1980 regulatory innovations, and the retroactive rejection remedy had been prominent among them. See 44 Fed. Reg. 60122, 60123–

60124 (1979); see also *Motor Carrier Rate Bureaus—Implementation of P. L. 96–296*, 364 I. C. C. 464, 503 (1980) (Commissioner Gilliam, concurring); 45 Fed. Reg. 55742 (1980) (Commissioner Stafford, dissenting). Thus, while the 1980 Congress may not have intended to diminish the Commission's existing enforcement authority, there can be no doubt about its intention to prevent the Commission from unilaterally enlarging its own discretionary powers.

B

The Court contends, nevertheless, that the rejection power is directly and closely tied to 49 U. S. C. § 10762(e). *Ante*, at 369–371. On this view, nullification of effective tariffs is necessary both to ensure that motor carriers comply with the guidelines established by Congress and to stimulate competitive pricing beyond the bounds of the motor-carrier immunity granted in § 10706(b)(3). Though resulting awards could easily surpass the damages for which carriers may be held liable under the antitrust laws, and could therefore convert the Commission into the Federal Government's most potent antitrust enforcer, the Court concludes that deference to the Commission's efforts to enforce § 10706(b)(3), is not inappropriate. *Ante*, at 370–371. I must disagree.

Even if Congress had left the Commission discretion to fashion *some* new remedies to enforce § 10706(b)(3), there is much reason to believe that the retroactive rejection power could not properly be among them. As previously noted, the Commission proposed to use this same retroactive rejection remedy for similar purposes prior to the 1980 legislation. See *supra*, at 375. The Commission was concerned, because of budgetary constraints and increased tariff filings, that it could not catch all improper tariffs and that carriers would have incentives to exceed their limited immunity from the antitrust laws. *Ibid.* The 1980 Congress was well aware of the Commission's concerns and of the remedies the Commission then had available to it. Yet Congress did not include the rejection power in its comprehensive restructuring of the rate bureau regulatory system. Rather, it emphasized that it did not want to increase the power of the Commission. Perhaps the Commission is correct in asserting that shippers lack sufficient incentives to ensure optimal enforcement of the antitrust laws. But that is a gap Congress obviously wanted the Department of Justice, not the Commission, to fill. See 364 I. C. C., at 503 (Commissioner Gilliam, concurring); 46 Fed. Reg. 2295 (1981) (Commissioner Clapp, concurring). Making the Commission the most potent enforcer of the Nation's antitrust laws is hardly compatible with the congressional antagonism toward the Commission's specific pre-1980 deregulation initiatives.

Indeed, it is easy to see why Congress would not have included a retroactive rejection power among the arsenal of powers available to the Commission. Part of the Motor Carrier Act's purpose was, as the Commission asserts, to limit the rate bureaus' freedom to engage in collusive behavior. Conversely, however, the 1980 Act was equally intended to promote certainty in industry pricing and to protect carriers' reliance on filed tariffs. In the motor carrier industry, goods are shipped, revenues collected, and business plans formulated in reliance on these tariffs. In 1980, Congress apparently continued to believe that effective national transportation policy requires that carriers be able to rely on their filed rates and know that liability for charging those rates will result only if shippers show actual damage. Congress has deliberately encouraged carriers, within limits, to set prices collectively, and has insulated them from the proscriptions of the antitrust laws when they do so. The rejection power, by contrast, confronts carriers with a large and uncertain liability and discourages the collective price setting clearly contemplated by the Act. The rejection power "create[s] a legalized, but endless, chain of departures from [filed] tariff[s]; . . . destroy[s] the equality and certainty of rates, and, contrary to the statute, . . . make[s] the carrier liable for damages beyond those inflicted and to persons not injured." *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 421 (1924). The power is, therefore, incompatible with collective aspects of the rate-setting scheme Congress intended to promote.

III

What the Commission really seeks is a remedy that is not statutorily authorized but that is alleged to be administratively needed. The need, of course, is far from clear, given the impressive array of prescriptive powers, overcharge assessments, damages remedies, and civil and criminal fines at the Commission's disposal. See 49 U. S. C. §§ 11705(b)(1)–(3), 10704, 11901(b), 11914(b). If the Commission believes that it needs additional remedial power to enforce the rate bureau provisions, it should seek such power from Congress. But this Court is no more authorized than is the Commission to rewrite the law. Since that is what today's decision allows the Commission to do, I respectfully dissent.

ALUMINUM COMPANY OF AMERICA ET AL. *v.* CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1071. Argued January 9, 1984—Decided June 5, 1984

Since enactment of the Bonneville Project Act of 1937 (Project Act), the Bonneville Power Administration (BPA) has marketed low-cost hydroelectric power generated by a series of dams along the Columbia River. BPA sells two types of power: "firm" power (energy that BPA expects to produce under predictable streamflow conditions) and "nonfirm" power (energy that is in excess of firm power and is provided only when such excess exists). BPA's customers include three groups: (1) "public bodies and cooperatives," which include public utilities and which are "preference" customers to whom BPA is required to give priority over nonpreference customers; (2) private, investor-owned utilities (IOUs); and (3) direct-service industrial customers (DSIs), which purchase power directly from BPA instead of through a utility. IOUs and DSIs are "nonpreference" customers. As demand for power increased to exceed BPA's generating capability, Congress moved to avert a customer struggle for BPA power by enacting in 1980 the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act). Section 5(a) of that Act requires all power sales under the Act to be subject to the preference and priority provisions of the Project Act. Section 5(d)(1)(B) requires BPA to offer each existing DSI customer a new contract that provides "an amount of power" equivalent to that to which such customer was entitled under its existing 1975 contract. Section 10(c) provides that the Act does not "alter, diminish, abridge, or otherwise affect" federal laws by which the public utilities are entitled to preference. Pursuant to the Regional Act, the Administrator of BPA offered new contracts to DSI customers for the same amount of power specified by the existing 1975 contracts, but, based upon his interpretation of the statute and its legislative history, concluded that terms of the power sales need not be the same as they had been under the 1975 contracts. Those contracts had provided that a portion of the power supplied to DSIs could be interrupted "at any time," thus making that portion subject to the preference provisions of the Project Act and enabling preference utilities to interrupt it whenever they wanted nonfirm power. The Administrator concluded that such a provision in the new contracts would conflict with the directive of § 5(d)(1)(A) of the Regional Act that sales to DSIs should provide a portion of the Administrator's reserves for firm power loads. Accordingly, the new contracts allowed power interruption only to protect BPA's firm power obligations, thus reducing the amount of nonfirm power available to preference utilities. Respondent preference utilities challenged the new contracts by a petition for review in the Court of Appeals, claiming that those contracts violated the preference accorded to nonfirm power under the 1975 contracts, that §§ 5(a) and 10(c) of the Regional Act required that DSI power be interruptible under the new contracts on the same terms as it was under the 1975 contracts, and that the conditions in the new contracts provided DSIs with a greater "amount of power" than the 1975 contracts, in violation of § 5(d)(1)(B) of the Regional Act. The Court of Appeals agreed and found the Administrator's interpretation of the Regional Act unreasonable.

Held:

1. Giving the Administrator's interpretation of the Regional Act the deference it is due, his interpretation is a fully reasonable one, particularly in the absence of any statutory provision affirmatively indicating the contrary. It is reasonable to conclude that the statutory directive that the new contracts be for the same "amount of power" as the 1975 contracts requires simply that the new contracts involve the same number of kilowatts, and, contrary to respondents' argument, does not preclude curtailing the situations in which power can be interrupted. Nor is there any merit to respondents' argument that the terms of the new contracts conflict with § 5(a) of the Regional Act. While that section preserves the priority and preference provisions of the Project Act, that preference system merely determines the priority of different customers when the Administrator receives "conflicting or competing" applications for power that he is authorized to allocate. The new contracts offered to the DSIs are not part of such an administrative allocation of power; the power sold pursuant to those contracts is allocated directly by statute. The Project Act's preference provisions, as incorporated in the Regional Act, therefore simply do not apply to the contracts that the latter Act requires BPA to offer. Pp. 389–395.

2. The legislative history of the Regional Act confirms the Administrator's interpretation. That history shows that Congress paid specific attention to power sales to DSIs, and consulted BPA on the relationship between those sales and the Act's broader purposes. There is no indication that Congress intended the new DSI contracts to have provisions governing interruptibility that were the same as in the 1975 contracts. Pp. 396–398.

3. Because the Regional Act does not comprehensively establish the terms on which power is to be supplied to DSIs under the new contracts,

the Administrator has broad discretion to negotiate them. Sales to DSIs under that Act are intricately related to the "exchange" program established by the Act to reduce the disparity existing under the Project Act whereby consumers served by public utilities enjoyed much cheaper power than consumers served by IOUs. Pp. 398–400.

686 F. 2d 708, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 400.

M. Laurence Popofsky argued the cause for petitioners. With him on the briefs were *Eric Redman*, *Peter A. Wald*, and *Dian M. Grueneich*.

Jerrold J. Ganzfried argued the cause for the federal respondents under this Court's Rule 19.6, urging reversal. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Claiborne*, and *Bruce G. Forrest*.

Jay T. Waldron argued the cause for respondents Central Lincoln Peoples' Utility District et al. With him on the brief was *Donald A. Haagensen*. *James W. Durham*, *Alvin Alexanderson*, and *Robert T. O'Leary* filed a brief for respondents Portland General Electric Co. et al. *Robert M. Greening, Jr.*, filed a brief for respondent Public Power Council.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Since enactment of the Bonneville Project Act of 1937, 50 Stat. 731, 16 U. S. C. § 832 *et seq.* (Project Act), the Bonneville Power Administration (BPA) has marketed low-cost hydroelectric power generated by a series of dams along the Columbia River. Although § 4(a) of the Project Act, 16

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*Briefs of *amici curiae* urging affirmance were filed for the American Public Power Association et al. by *Lee C. White* and *Grace Powers Monaco;* and for International Paper Co. et al. by *Donald P. Swisher* and *Allan M. Garten*.

U. S. C. § 832c(a), directs the BPA Administrator to "give preference and priority to public bodies and cooperatives" when selling its power, BPA for many years enjoyed a surplus of power that allowed it to satisfy the needs of all customers in the region. As demand for power increased to exceed BPA's generating capability, however, the allocation of low-cost federal power became an issue of significant area concern. In 1980, Congress moved to avert what appeared to be an emerging customer struggle for BPA power by enacting the Pacific Northwest Electric Power Planning and Conservation Act, 94 Stat. 2697, 16 U. S. C. § 839 *et seq.* (Regional Act). That Act required BPA to offer new contracts to its several customers. Some of the respondents[1] brought this suit to challenge the new contracts that BPA signed with certain customers. The United States Court of Appeals for the Ninth Circuit held that the contracts violated the statute. We now reverse that judgment, and remand the case to the Court of Appeals for further proceedings.

I

Before discussing the Regional Act's provisions that give rise to the dispute, certain aspects of hydroelectric power generation and the Project Act's allocation scheme must be explained.

Because the amount of power generated by BPA depends on streamflow in the Columbia River system, BPA cannot predict with accuracy the amount of power that it can generate. Accordingly, BPA historically has sold two types of power. "Firm power" is energy that BPA expects to produce under predictable streamflow conditions. "Nonfirm" power is energy in excess of firm power, and is provided only when such excess exists.

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[1] Throughout this opinion, the term "respondents" is used to refer only to those parties who support the Court of Appeals' judgment. The term does not include the Administrator of BPA and the Secretary of the Department of Energy, who nominally are respondents in this case even though they urge reversal of the judgment below.

BPA's customers include three groups that are relevant to this case.[2] The primary group is what the Project Act refers to as "public bodies and cooperatives," which includes public utilities and other public entities.[3] These entities are "preference" customers, and BPA is required to give priority to their applications for power when competing applications from nonpreference customers are received. See § 4(b) of the Project Act, 16 U. S. C. § 832c(b). BPA's other two groups of customers are private, investor-owned utilities (IOUs), and direct-service industrial customers (DSIs). The latter are large industrial end-users that purchase power directly from BPA instead of through a utility. IOUs and DSIs are "nonpreference" customers, and BPA is allowed to contract to sell to them only power for which preference customers do not apply. Once a contract between BPA and a customer is signed, however, the Project Act makes clear that the contract is "binding in accordance with the terms thereof." § 5(a), 16 U. S. C. § 832d(a).

In the early years of the Project Act, BPA's contract with each of its customers obligated BPA to supply the customer's full contractual requirements on a "firm," noninterruptible basis. In 1948, the increasing demand for power in the Northwest caused BPA to modify its industrial sales policy so as to require that, where feasible, a new contract signed with a DSI provide that some power be supplied on a nonfirm basis. This condition meant that a portion of DSI power could be interrupted when necessary to supply BPA's preference customers. DSIs are unique among BPA's customers in their ability to tolerate such interruptions in service; they are able to do so because some of their industrial processes can withstand periodic power interruptions without damage. Utilities, on the other hand, require power on a noninterruptible basis because their residential consumers cannot withstand periodic interruptions in service.

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[2] In addition to the three relevant customer categories, BPA is also authorized to sell power to federal agencies in the region. See § 5(b)(3) of the Regional Act, 16 U. S. C. § 839c(b)(3). Sales to such agencies have no pertinency for this litigation.

[3] Section 3 of the Project Act, 16 U. S. C. § 832b, defines "public bodies" as "States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof." It defines "cooperatives" as "nonprofit-making . . . organizations of citizens supplying . . . members with any kind of goods, commodities, or services, as nearly as possible at cost."

The increased demand for power in the 1970's required that BPA alter its sales policies even more drastically. Projections at that time showed that because of increased power demand, preference customers soon would require all of BPA's power. See H. R. Rep. No. 96–976, pt. 1, pp. 23–27 (1980). Accordingly, BPA announced in 1973 that new contracts for firm power sales to IOUs would not be offered. In addition, when BPA signed contracts with DSIs in 1975, it specified that 25% of their power would be subject to interruption "at any time," and it advised the DSIs that as their new contracts expired during the 1981–1991 period, they were not likely to be renewed.

The increase in demand soon threatened even the ability of BPA's preference customers to obtain federal power to meet their full power needs. In 1976, BPA informed its preference customers that BPA would not be able to satisfy preference customer load growth after July 1, 1983, and BPA began to consider how to divide the available federal power among its preference customers.

The high cost of alternative sources of power caused BPA's nonpreference customers vigorously to pursue ways to regain access to cheap federal power. Most important, many areas that were served by IOUs moved to establish public entities designed to qualify as preference customers and be eligible for administrative allocations of power.[4] Because the

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[4] Because of the preference accorded public utilities over private ones, those States that had a relatively large proportion of public utilities benefited from the federal power more than the States in which most consumers were served by IOUs. Although 80% of the consumers in the State of

Project Act provided no clear way of allocating among preference customers, and because the stakes involved in buying cheap federal power had become very high, this competition for administrative allocations threatened to produce contentious litigation. The uncertainty inherent in the situation greatly complicated the efforts by all BPA customers to plan for their future power needs.

To avoid the prospect of unproductive and endless litigation, Congress enacted the Regional Act. The Act provided for future cooperation in the region by establishing a mechanism for comprehensive federal/state power planning. §§4 and 6, 16 U. S. C. §§839b and 839d. For the first time, moreover, BPA was authorized to acquire resources to increase the supply of federal power.[5] In addition, §5 of the Act, 16 U. S. C. §839c, sought to avert disputes over the allocation of power by requiring BPA to enter into an initial set of contracts with its various types of customers.

Section 5(d)(1)(B) of the Act, 16 U. S. C. §839c(d)(1)(B), required that "[a]fter the effective date of this Act [Dec. 5, 1980], the Administrator shall offer . . . to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 . . . ." These contracts were to

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Washington had access to BPA power because they were served by preference customers, only 20% of the consumers in Oregon had access to such power. See Pacific Northwest Electric Power Supply and Conservation: Hearings on H. R. 9020, H. R. 9664, and H. R. 5862 before the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess., pt. 3, p. 9 (1977).

[5] Under the Project Act, BPA did not have authority to own, construct, or purchase the output or capability of electricity generating plants except to meet short-term deficiencies; BPA was entirely a marketing agency that disposed of power generated at dams constructed by the Army Corps of Engineers and what was then called the Bureau of Reclamation (now the Water and Power Resources Service). See H. R. Rep. No. 96-976, pt. 2, pp. 26-27 (1980).

replace the existing DSI contracts that were scheduled to expire at various times during the period 1981–1991. Section 5(d)(1)(A) indicated that the sales to the DSIs under the new contracts were to "provide a portion of the Administrator's reserves for firm power loads within the region."[6]

Pursuant to this statutory directive, the Administrator offered new, 20-year contracts to its DSI customers. The contracts were for the same amount of power specified by the existing 1975 contracts. Based upon his interpretation of the statute and the legislative history of the Act, however, the Administrator concluded that the terms of the power sales were not to be the same as they had been under the 1975 contracts. The 1975 contracts provided that a portion (the "top quartile") of the power supplied to DSIs could be interrupted "at any time." This provision made the top quartile of DSI power subject to the preference provisions of the Project Act, and enabled preference utilities to interrupt it whenever they wanted nonfirm power. The Administrator concluded that such a provision in the new contracts would conflict with § 5(d)(1)(A)'s directive that sales to DSIs should "provide a portion of the Administrator's reserves for *firm* power loads" (emphasis added). Accordingly, the Administrator offered DSI customers contracts that allowed interruption only to protect BPA's firm loads, and not to make sales of nonfirm energy. 46 Fed. Reg. 44340 (1981).

This aspect of the new DSI contracts is at the center of the present dispute. Under the Project Act, nonfirm power was allocated hourly on an "if available basis," and was subject to the preference provisions of that Act. Although nonfirm power is too unreliable for preference utilities to use to satisfy the demands of their consumers on a general basis, it nevertheless is attractive to many preference utilities because it could be used as a substitute for power they generated themselves. In this manner, nonfirm power purchases enabled preference utilities to shut down their own facilities when they required maintenance, or if they could not generate power as cheaply as BPA. Alternatively, preference utilities appear to have been able to "arbitrage" BPA's nonfirm power by using it to displace their own power, which they then sold to users that could not purchase power directly from BPA.[7] By making DSI power interruptible under the new contracts only to protect BPA's firm power obligations, the new contracts reduced the amount of nonfirm power available to preference utilities.

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[6] The statute defines "reserves" as "the electric power needed to avert particular planning or operating shortages for the benefit of *firm* power customers . . . ." § 3(17), 16 U. S. C. § 839a(17) (emphasis added).

Shortly after the Administrator's decision and the execution of new DSI agreements, respondents challenged the contracts by petition for review in the Court of Appeals. The core of their challenge was that the proposed contracts violated the preference to nonfirm power accorded under the 1975 contracts. That preference, it was said, was reserved by § 5(a) of the Regional Act, 16 U. S. C. § 839c, which states: "All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 . . . ." Respondents also relied on § 10(c) of the Regional Act, 16 U. S. C. § 839g(c), which provides that the Act does not "alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power." Respondents argue that these provisions require that DSI power be interruptible under the new contracts on the same terms as it was under the 1975 contracts. In addition, respondents assert that the conditions in the new contracts effectively provide the DSIs with a greater "amount of power" than their 1975 contracts, in violation of § 5(d)(1)(B) of the Regional Act, 16 U. S. C. § 839c(d)(1)(B).

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[7] Respondents' discussion of this use of nonfirm power seems to us to be somewhat less than persuasive. The parties agree that the direct resale of BPA power by preference customers is prohibited. Petitioners contend, however, that respondents can and do use nonfirm federal power to displace their own power, which they can resell to other users. See Brief for Petitioners 47; Reply Brief for Petitioners 18, n. 58. Respondents do not specifically deny this, and simply emphasize their "other uses" for nonfirm power and the fact that they use the BPA power to serve their customers. See Brief for Respondent Public Power Council 20–21; Brief for Respondents Central Lincoln Peoples' Utility District et al. 9, n. 25. We therefore take respondents to have conceded that they do arbitrage the nonfirm BPA power.

The Court of Appeals agreed with respondents and found the Administrator's interpretation of the Act to be unreasonable. *Central Lincoln Peoples' Utility District* v. *Johnson*, 686 F. 2d 708 (CA9 1982). The court relied heavily on §§ 5(a) and 10(c) of the Regional Act to conclude that the Act preserved the longstanding practice of allocating nonfirm power under the 1975 contracts. Because of the importance of the issue, we granted certiorari. 460 U. S. 1050 (1983).

II

A

Under established administrative law principles, it is clear that the Administrator's interpretation of the Regional Act is to be given great weight. "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982). "To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' . . . We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U. S. 402, 422–423 (1983), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946).

These principles of deference have particular force in the context of this case. The subject under regulation is technical and complex. BPA has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress. Following enactment of the statute, the agency immediately interpreted the statute in the manner now under challenge. Thus, BPA's interpretation represents "'a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), quoting *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961).

Giving the Administrator's interpretation the deference that it is due, we are convinced that his interpretation is a fully reasonable one. Section 5(d)(1)(B) of the Regional Act, 16 U. S. C. § 839c(d)(1)(B), expressly directs the Administrator to offer each existing DSI an initial long-term contract for the same amount of power as provided in its existing contract. It is therefore beyond dispute that the plain language of the statute mandates that contracts be offered. Respondents challenge the contracts, however, because they contain interruptibility provisions different from those in the 1975 contracts. Respondents offer essentially two arguments in support of their position. Neither is persuasive.

First, respondents claim that the new contracts violate the statutory directive that the contracts be for the same "amount of power" as the 1975 contracts. Because the proposed contracts curtail the situations in which power can be interrupted, respondents argue that they effectively provide DSIs with a greater amount of power than they would have received under the 1975 contracts. Petitioners and the Administrator contend, on the other hand, that the term "amount of power" refers only to the quantity of power to be sold to the DSIs as measured in kilowatts. They claim that the phrase does not determine the interruptibility or "quality" of the power that is sold under the required contracts.

The distinction between power amount and power "quality" is a valid one that can be seen by reference to the 1975 contracts. Under those contracts, the "amount" of power referred simply to the number of kilowatts sold. The contractual terms governing the interruptibility of the power were included in other provisions in the contracts. See contract between BPA and Kaiser Aluminum & Chemical Corp. (1975), App. to Pet. for Cert. N–2, N–5. It is reasonable to conclude that the statutory directive that the new contracts be for the same "amount of power" as the 1975 contracts requires simply that the new contracts involve the same number of kilowatts. Respondents do not contend that the new contracts fail to meet this requirement.

Sections 5(d)(1)(A) and 3(17) of the Regional Act lend support to this interpretation. The former expressly requires that power sales to the DSIs "shall provide a portion of the Administrator's reserves for firm power loads." The latter defines reserves as the power needed to protect BPA's "firm power customers" from shortages. It is clear from these provisions that at least some portion of DSI power is interruptible to protect the firm needs of other customers. In addition, however, these provisions support the Administrator's inference that the Regional Act does not require DSI power to be interruptible to meet the nonfirm power desires of preference customers, and the legislative history confirms this view. The Report of the Senate Committee on Energy and Natural Resources clearly explains: "[T]he term 'firm power customers of the Administrator' is intended to mean the firm power loads of such customers. *It is not intended that the Administrator's reserves will be used to protect other than firm loads*" (emphasis supplied). S. Rep. No. 96–272, p. 23 (1979). Because it is clear that the top quartile of DSI power is a part of BPA's reserves, that power is not to be used to serve nonfirm power loads.

Respondents' claim that the top quartile of power must be interruptible "at any time" in order to provide the DSIs with the same "amount of power" is incorrect even under respondents' own interpretation of the phrase. The parties agree that the DSIs' *second quartile* of power can be interrupted in more situations under the new contracts than under the 1975 contracts, and that the power quality of the second quartile is therefore lower than before. See Respondents' Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review, filed Sept. 8, 1981, App. 21 (table comparing interruptibility of second quartile of DSI power in 1975 and new contracts). The legislative history of the Regional Act makes clear that Congress expressly endorsed, perhaps even required, that the new contracts contain the conditions making the second quartile power more interruptible than before.[8] If, as respondents would have it, the top quartile of power remained interruptible in the same situations as under the 1975 contracts, but the second quartile became more interruptible than before, it is apparent that the new contracts would provide the DSIs with a smaller total "amount of power," as respondents seek to define that phrase. In short, Congress could not have contemplated interruptibility terms for the second quartile different from those in the 1975 contracts, and at the same time have insisted that DSIs get the "same amount of power" under respondents' definition of the phrase; it is clear therefore, that that definition is not what Congress intended.

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[8] The House Interior and Insular Affairs Committee Report, for example, expressly stated that the second quartile under the new contracts, "will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA." H. R. Rep. No. 96-976, pt. 2, p. 48 (1980). The language in this Report is copied verbatim from a letter written by the BPA Administrator to the House Subcommittee explaining how BPA would serve the DSI load under the Regional Act. See Appendix III to Letter dated Aug. 19, 1980, from BPA Administrator to Rep. Kazen, Chairman, House Subcommittee on Water and Power Resources, App. to Pet. for Cert. I-23. A similar statement is in the Senate Report. S. Rep. No. 96-272, p. 28 (1979). The second quartile interruptibility provisions described similarly in all of these passages differ from those in the 1975 contracts.

The dissent apparently concedes that the second quartile interruptibility provisions of the new contracts differ from those in the 1975 contracts, *post*, at 403-405, and the dissent is presumably aware of the legislative history specifically endorsing the new provisions. Thus, the dissent acknowledges that its interpretation of the phrase "same amount of power" leads to an inconsistency, but claims that Congress was not "aware that it was *altering* the interruptibility provisions" (emphasis supplied), apparently assuming that Congress simply forgot what was in the 1975 contracts. It seems improvident to assume such ignorance on the part of Congress, not to mention the Administrator of BPA, when Congress clearly had to focus on the terms of the 1975 contracts in drafting several aspects of the statute.

Respondents' second argument is that the terms of the new contracts conflict with § 5(a) of the Regional Act. It is true, as respondents assert, that that section preserves the priority and preference provisions that existed under the Project Act. But the preference system merely determines the priority of different customers when the Administrator receives "conflicting or competing" applications for power that the Administrator is authorized to allocate administratively. § 4(b) of the Project Act, 16 U. S. C. § 832c(b). In the instant case, the initial contracts offered by the Administrator to the DSIs are not part of an administrative allocation of power. The power sold pursuant to those contracts is allocated directly by the statute. Because there is no administrative allocation of power, there can be no competing applications. The preference provisions of the Project Act as incorporated into the Regional Act therefore simply do not apply to the initial contracts that the statute requires the BPA to offer.[9]

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[9] The reliance by respondents and the Court of Appeals on § 10(c) of the Regional Act, 16 U. S. C. § 839g(c), is similarly misplaced. Section 10 is entitled "Savings Provisions." The purpose of § 10(c) was to reassure preference customers in other regions of the country who feared that the Regional Act—by statutorily allocating power directly to nonpreference customers—would set a precedent that would weaken the commitment to preference that exists in other statutes governing the sale of federal power generated in other regions. See H. R. Rep. No. 96–976, pt. 1, pp. 34–35 (1980); cf. 126 Cong. Rec. 29803 (1980) (remarks of Rep. Udall). That section thus is irrelevant to the issue in this case.

Respondents' argument that power sold to DSIs under the new contracts is subject to preference implicitly proves too much. There is nothing in either the rules governing preference or the Project Act that distinguishes the top quartile of DSI power from the other three quartiles. Under the 1975 contracts, the difference between the top quartile and the other quartiles was the provision in those contracts that made the top quartile subject to interruption "at any time." That contract term allowed the Administrator to treat the top quartile of power as if it were uncommitted, and subjected it to preference. The other three quartiles were not subject to preference simply because the terms of the contracts did not so provide. Thus, the distinction among the different quartiles under the 1975 contracts was a product of the terms of the contracts, not a requirement of the Project Act's preference provisions. There is likewise nothing in the Regional Act that distinguishes between the top quartile and the other quartiles for purposes of applying preference when offering the new DSI contracts. If respondents are correct that the power sold to the DSIs under the new contracts is subject to preference, then respondents have preference not only for power in the top quartile, but for the other three quartiles as well. For as long as that power is uncommitted, the preference provisions apply. Once committed by contract, the interruptibility of the power is determined by the terms of the contract. § 5a, 16 U. S. C. § 832d(a).

It appears, therefore, that respondents' view of the Regional Act would render meaningless the initial contracts contemplated by § 5(d)(1)(B). Respondents' argument is essentially that the allocation of power under the mandated contracts should be the same as it would be if the preference rules applied. But Congress presumably included § 5(d)(1)(B) precisely because it wanted to achieve an allocation of power that differs from what allocation by preference would produce; preference was the perceived problem, not the chosen solution.[10]

The Administrator's interpretation of the Regional Act also is supported by § 5(g)(7) of that Act, 16 U. S. C. § 839c(g)(7). That section "deem[s]" the Administrator "to have sufficient resources for the purpose of entering into the initial contracts" mandated by the statute. Through this express legal fiction, Congress ensured that the initial contracts could not be challenged by a claim that BPA lacked the power to enter into contracts with nonpreference customers. Congress clearly intended BPA to offer the DSI contracts even if that necessitated the acquisition by BPA of additional power through outside purchases and construction of new generating facilities. If preference were to apply to the initial contracts, however, they could be executed only after preference customers have purchased all the power they desire. Such a condition would be truly incongruous, for it could require BPA to obtain an almost unlimited amount of power. When Congress "deemed" the Administrator "to have sufficient resources for the purpose of entering into the initial contracts specified" by the Act, it is only sensible to assume that Congress intended such contracts to be made without regard to the preference rules that govern sales that are not statutorily mandated.

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[10] To say that the preference provisions do not apply to the initial set of contracts does not make preference meaningless. As was the case prior to the Regional Act, preference continues to govern the allocation of all power that is not committed by contract. Thus, the preference rules will apply to any subsequent contracts made with DSIs. Even during the period of the initial contracts, the preference provisions apply to any surplus power that exists. See 16 U. S. C. § 839c(f). Such surplus might exist, for example, because of especially high annual or seasonal streamflow fluctuations, or because BPA's power acquisition program secures additional power faster than BPA's increasing contractual commitments. See Mellem, Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act, 58 Wash. L. Rev. 245, 269–273 (1983).

B

The legislative history of the Regional Act confirms the interpretation put forward by BPA and petitioners. That history shows that Congress paid specific attention to power sales to DSIs, and consulted BPA on the relationship between those sales and the broader purposes of the Act. The record gives no indication that Congress intended the new DSI contracts to have provisions governing interruptibility that were the same as in the 1975 contracts.

The Committee Reports of both Houses made particular reference to the DSI contracts and the manner in which those sales would provide the reserves for the Administrator's other obligations. The Senate Report contains the following explanation of the section dealing with DSI sales.

> "*The power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect service to firm loads of the Administrator.* It is intended that these contracts at least provide peaking power reserves similar to those provided in the present contracts, and that the energy reserves shall include a reserve approximately equal to 25 percent of the direct service industrial load *to protect firm loads* for any reason, including low or critical streamflow conditions . . ." (emphasis supplied). S. Rep. No. 96–272, p. 28 (1979).

This passage flatly contradicts respondents' argument. The first sentence makes clear that the "quality" of the power provided to the DSIs is determined by the need to provide reserves to protect "the firm loads of the Administrator." The sentence is noticeably devoid of any suggestion that the quality of power is to be the same as it was under the 1975 contracts. The rest of the passage reinforces the view that the purpose of the interruptibility provisions is "to protect firm loads."

The House Report indicates a similar understanding:

> "Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by the BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads." H. R. Rep. No. 96–976, pt. 2, p. 48 (1980).

This passage confirms that DSI sales were to be interruptible "to protect the Administrator's firm loads." Such a requirement would have little meaning if, as respondents would have it, the statute also requires DSI power to be interruptible at any time for any reason.

The source of this language in the House Report is significant. While the bill was still under consideration, BPA conferred with the Committee's staff and furnished the Committee with its understanding of how sales to DSIs would operate. The passage from the Report quoted above is an almost verbatim incorporation of BPA's understanding of the provision. See Appendix III to Letter dated Aug. 19, 1980, from BPA Administrator to Rep. Kazen, Chairman, House Subcommittee on Water and Power Resources, App. to Pet. for Cert. I–23 (discussing the DSI service under the Regional Act). The legislative history therefore indicates that BPA consulted with Congress during the consideration of the Regional Act, and that BPA and Congress shared an understanding of the terms on which the Administrator would sell power to DSIs under the Act.

Respondents rely on the legislative history to establish two points, neither of which is controverted. First, respondents use the legislative history to demonstrate what § 5(a) already makes clear—that the Regional Act does not alter the priority provisions of the Project Act. See Brief for Respondents

Central Lincoln Peoples' Utility District et al. 23–30. Petitioners and the Administrator do not contest this point. But the issue in this case is not whether the preference rules have been changed; the issue is whether the preference rules apply to power that the statute requires BPA to sell to DSIs. Because it is clear that the power sold under the initial contracts is committed to DSIs by statute, it is equally clear that it is not uncommitted power to which preference applies.

Respondents' second use of the legislative history is to show that, under the 1975 contracts, the top quartile of DSI was subject to preference because it was interruptible "at any time." *Id.*, at 21–23. This point also is uncontroverted. The issue in this case, however, is whether the new contracts mandated by the Regional Act must provide that a portion of DSI power be subject to interruption "at any time." If so, there is no dispute over whether preference would apply to that power. But respondents have not pointed to anything in the Regional Act that requires that the interruptibility terms of the 1975 contracts be incorporated into the new contracts.

C

Because the Regional Act does not comprehensively establish the terms on which power is to be supplied to DSIs under the new contracts, it is our view that the Administrator has broad discretion to negotiate them. Such discretion is especially appropriate in this situation, because DSI sales are merely one part of a complicated statutory allocation plan designed to achieve several goals. Most important, sales to DSIs under the Regional Act are intricately related to the "exchange" program established by the Regional Act on behalf of nonpreference utilities. § 5(c), 16 U. S. C. § 839c(c).

The exchange program is designed to provide rate relief for consumers served by IOUs. As noted *supra*, the operation of preference under the Project Act produced an allocation of cheap federal power that heavily favored public utilities (preference customers) over private utilities (nonpreference customers). As a consequence, consumers that lived in areas served by public utilities enjoyed much cheaper power than consumers served by IOUs. The exchange program operates to reduce this disparity. Very briefly, the program consists of an "exchange" arrangement under which IOUs are allowed to sell power to BPA at their average system cost, and then purchase from BPA an equal quantity of cheaper federal power. The benefits to the IOUs under this program are to be passed on directly to residential consumers.

Because this exchange program essentially requires BPA to trade its cheap power for more expensive power, it is obviously a money-losing program for BPA. The Act expressly contemplates that much of the cost of this program is to be covered by power sales to DSIs, which pay a considerably higher price for power than other users. Section 7(c)(1), 16 U. S. C. § 839e(c)(1), expressly directs the Administrator initially to charge the DSIs a rate "sufficient to [cover] the net costs incurred by the Administrator" under the exchange program. The House Report explained the interrelationship between sales to DSIs and the exchange program in some detail:

> "[The DSIs] will also pay significantly higher rates under the new contracts. These higher rates permit the Administrator to enter into contracts with the region's investor-owned utilities for an exchange of power equal to the utilities' residential load. This exchange will permit residential customers of investor-owned utilities to share in the benefits of the lower-cost Federal resources. The power sold to BPA will be sold at the utilities' average system cost and purchased back at the rate paid by the preference customers' utilization *[sic]* their general requirements. The loss in revenue to the Administrator is in effect returned by the higher direct service industry rates. By providing these residential customers whole-

> sale rate parity with residential customers of preference utilities, the amendment serves in a substantial way to cure a major part of the allocation problem." H. R. Rep. No. 96-976, pt. 1, p. 29 (1980).

This passage makes clear that the DSI sales and the power exchange program are integrally related. BPA's ability to finance the exchange program is related to the amount of power that BPAs sell to DSIs, which in turn is determined by the interruptibility terms of the new DSI contracts. It is the responsibility of the Administrator to manage the complex relationship among these various aspects of the statute, and, absent an express statutory statement requiring particular terms in the contracts, it is appropriate that we give him broad discretion to determine them.[11]

III

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[12]

It is so ordered.

JUSTICE STEVENS, dissenting.

Section 5(d)(1)(B) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 94 Stat. 2697, provides:

> "[T]he Administrator shall offer in accordance with subsection (g) of this section to each existing direct service

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[11] In holding that the Regional Act does not require that DSI power be interruptible to serve the nonfirm power needs of preference customers, we do not decide whether the Administrator could negotiate for such a condition if he concluded that it would serve the purposes of the Act.

[12] One set of respondents argues that we should affirm the Court of Appeals' judgment, but narrow its scope. See Brief for Portland General Electric Company et al. Given our disposition of the case, we necessarily reject that argument.

> industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" 16 U. S. C. § 839c(d)(1)(B).

The critical question in this case is whether the contracts offered by the Administrator of the Bonneville Power Administration (BPA) pursuant to the 1980 Act are for "an amount of power equivalent to" the amount to which the direct service industrial customers (DSIs) were entitled under their 1975 contracts.

Under the 1975 contracts, 75 percent of the specified amount of power was virtually guaranteed; the "top quartile," however, was subject to interruption at any time to meet the demands of preference customers. Thus, the actual amount of power delivered under the 1975 contracts was an amount somewhere between 75 percent and 100 percent of the amount stated in the contracts.[1]

Under the 1980 contracts, 100 percent of the specified amounts is virtually guaranteed. No longer is the first quartile subject to interruption at any time. The result of changing the "quality" of first quartile power is to provide the DSIs with a larger amount of power than they would have received under the 1975 contracts. That is plainly inconsistent with § 5(d)(1)(B), which indicates that the DSIs'

> "contracts will provide power in amounts equal to, *but not greater than*, that which these companies are now entitled under existing contracts with BPA, and the terms of these contracts will require that these compa-

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[1] Apparently only about two-thirds of the first quartile load was being delivered to the DSIs during the years preceding the passage of the 1980 Act. See App. 36. Thus, it would seem that the amount of power actually delivered to those customers was approximately 91 percent of the stated contract amounts.

> nies continue to supply reserves for the region." H. R. Rep. No. 96–976, pt. 2, p. 29 (1980) (emphasis supplied).[2]

Thus, the new contracts do not comply with the plain language of the 1980 Act.[3]

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[2] The passage from the Senate Report quoted by the majority *ante*, at 396, when read in context, is inconsistent with the majority's conclusion that DSIs have greater protection against interruption under the 1980 Act than under their 1975 contracts:

"The power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect service to firm loads of the Administrator. It is intended that these contracts at least provide peaking power reserves similar to those provided in the present contracts, and that the energy reserves shall include a reserve approximately equal to 25 percent of the direct service industrial load to protect firm loads for any reason, including low or critical streamflow conditions, and an additional energy reserve of approxiamtely *[sic]* the same amount to protect firm loads against the delayed completition *[sic]* or unexpectedly poor performance of reginal *[sic]* generating resources or conservation measures, and against the unanticipated growth of regional firm loads. One intended result of these procedures is that there will be no increase in firm power commitments to the direct service industrial customs *[sic]*, except for technological improvements purposes." S. Rep. No. 96–272, p. 28 (1980).

When read in light of its last sentence, this paragraph makes it clear that Congress intended that DSIs have no greater assurance against interruption than they did under their 1975 contracts. Moreover, in a rate analysis submitted to Congress by the BPA, it estimated its projected revenues under the proposed legislation by assuming that it would continue to interrupt the top quartile of DSIs' power at the same rate that it had done so in the past, n. 1, *supra*, supplying from 86 to 96 percent of the DSIs' loads, and also anticipated interruptions in the top quartile in excess of those necessary to protect firm loads. See S. Rep. No. 96–272, at 59.

[3] To the extent that the Court relies on "deference" to the Administrator's interpretation of the 1980 Act, *ante*, at 390, it must be borne in mind that what is at issue here is the agency's construction of a statute:

"The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of a statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. Accordingly, the crucial issue at

The Court attempts to square its holding with the language of the statute by drawing a distinction between the "quantity" of power offered and its "quality." The Court believes that while § 5(d)(1)(B) requires the same quantity of power to be offered to DSIs as was offered in 1975, § 5(d)(1)(A) requires that the "quality" of the power be higher than under the 1975 contracts; under the 1980 Act the top quartile of power provided to DSIs is of a higher "quality" since it can be interrupted only for firm power loads. *Ante*, at 390–391. The proffered distinction between the "quantity" and "quality" of power is nonexistent, however. Kilowatts are fungible. Interruptibility is significant not because it affects the "quality" of power a customer receives, but because it affects the amount of power a customer receives. Under the challenged contracts DSIs receive power that is less freely interruptible than it was under their 1975 contracts; hence they are now entitled to a greater "amount of power" than they were under their 1975 contracts. That result violates the plain language of § 5(d)(1)(B).

In the 1981 contracts the DSIs agreed that the *second* quartile of power would be subject to interruption on two contingencies that were not applicable to the second quartile

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the outset is whether the Court of Appeals correctly construed the Act." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 31–32 (1981) (citations omitted).

It is also worth noting that the Adminstrator's interpretation of this Act has not been a model of consistency. In the BPA's final Environmental Impact Statement, issued in December 1980, it stated that top quartile DSI power can be interrupted "[a]t any time for any period for any reason." App. 31. Similarly, in its summary of its original draft contracts under the 1980 Act, it stated: "BPA may interrupt a portion of the DSI load, not to exceed 25 percent of the Operating Demand plus the Auxiliary Power, at any time, for any reason, and for any duration." *Id.*, at 74. See also n. 2, *supra*. In light of the lack of clarity that has characterized BPA's position both before and after the passage of the 1980 Act, its position surely is not entitled to so much deference as to override the plain import of the words Congress enacted. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976).

under the 1975 contracts. They therefore argue and the Court concludes, *ante*, at 390–391, that since respondents do not object to the fact that the second quartile under the 1980 contracts is of a different quality than under the 1975 contracts, respondents must accept the conclusion that "quality" has a meaning different from quantity. But it was after the Act was passed that the Administrator and the DSIs agreed upon a new contract that provided the DSIs with substantially more first quartile power with a fairly remote possibility of a lesser amount of second quartile power. The net result of the trade-off is still to give the DSIs significantly greater contractual entitlements than they had under the 1975 contracts. Whatever the actual comparison between the second quartile provisions of the 1975 and 1981 contracts, this argument tells us nothing about the intent of Congress since the legislative history contains no indication that Congress was aware that it was altering the interruptibility provisions of either the first or second quartiles. To the contrary, the legislative history indicates that Congress thought it was not altering the DSIs' entitlement to power. See n. 2, *supra*.

Moreover, it is questionable whether the second quartile interruptibility provisions of the 1980 Act constitute a real difference from the interruptibility provisions of the 1975 contracts with respect to that quartile. As the majority explains, *ante*, at 392, n. 8, the 1980 Act anticipated interruption of the second quartile only because of delayed completion or unexpectedly poor performance of generating resources or conservation measures. Prior to the 1980 Act, BPA had no authority to acquire or expand its resources; its function was merely to market power generated at dams constructed by the Army Corps of Engineers. See *ante*, at 386, and n. 5. Hence, the 1980 Act permits second quartile interruption only on a basis that *would not have arisen* under the 1975 contracts.[4] Surely this relatively insignificant and somewhat esoteric modification of the second quartile provisions is less persuasive evidence of congressional intent than the plain language of the statute itself.

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[4] Even if the issue would have arisen under the 1975 contracts, it is doubtful that the DSIs would have been entitled to second quartile power

The language of § 5(d)(1)(A) should be of little comfort to the majority. All it says is:

> "The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region." 16 U. S. C. § 839c(d)(1)(A).[5]

This subsection makes no reference at all to the "quality" of power to which DSIs are entitled. If this language was designed to entitle DSIs to higher "quality" power than they received under their 1975 contracts, then Congress picked a rather obtuse way of expressing the idea.

I read the subsection to mean what it says. The sales that the Administrator makes to the DSIs are part of the reserve for firm power loads.[6] In the event of a shortfall, the Administrator is obligated to use top quartile DSI power to meet his firm power obligations even when there is a prefer-

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in the circumstances in which interruption is permitted under the 1980 Act; those circumstances most likely would have given rise to a commercial frustration defense permitting BPA to interrupt second quartile power to the DSIs.

[5] Section 3(17) of the Act defines "reserves":

"'Reserves' means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator (A) from resources or (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers." 16 U. S. C. § 839a(17).

[6] The legislative history of § 5(d)(1)(A), of which the Court makes so much, *ante*, at 396–397, does not demonstrate that the statute means something other than what it says. The passages from the Committee Reports on the Act quoted by the majority state that the Administrator must treat the top quartile as a reserve to protect firm loads. That he has surely done. But it does not speak to whether that quartile is interruptible to meet the needs of preference customers. See also n. 2, *supra*.

ence customer seeking to purchase power; in this respect § 5(d)(1)(A) was necessary to change the law with respect to the rights of preference customers, which would otherwise have had priority even over purchasers of firm power.[7] But a provision ordering the Administrator to use top quartile power as a reserve for firm loads sheds no light on the extent of his obligation to sell power to the DSIs. That obligation is governed not by § 5(d)(1)(A), but by § 5(d)(1)(B).[8]

Because I find nothing in the statute or in its legislative history to indicate that Congress intended to allocate a greater amount of power to the DSIs than they were entitled to receive under their 1975 contracts, I cannot square the Court's holding with the plain language of the statute. I therefore respectfully dissent.

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[7] Prior to the passage of the 1980 Act, the Ninth Circuit had construed preference provisions to prohibit the sale of power to a private customer whenever there is a preference customer willing to buy it. See *City of Santa Clara* v. *Andrus*, 572 F. 2d 660, 670–671 (CA9), cert. denied, 439 U. S. 859 (1978); *Arizona Power Pooling Assn.* v. *Morton*, 527 F. 2d 721, 727–728 (CA9 1975), cert. denied, 425 U. S. 911 (1976).

[8] In Part II–C of its opinion, *ante*, at 398–400, the Court points out that the higher rates charged to DSIs provide a subsidy for certain consumers served by investor-owned utilities, implying, I suppose, that it makes good sense to sell the DSIs more power than they received under the 1975 contracts. If Congress had wanted the Administrator to exploit the DSI market by increasing the amount of such sales, it should not have limited their share of the available supply to an "amount of power equivalent to that to which" DSIs were entitled under the 1975 contracts. And in fact the rate analysis submitted by BPA indicated that it would supply power to DSIs at the same levels as it did under the 1975 contracts. See n. 2, *supra*. Rather, the fact that the Administrator charged higher rates to DSIs after the 1980 Act became effective is significant only because it explains why § 5(d)(1)(B) did not simply provide that the new contracts would contain precisely the same terms and conditions as the 1975 contracts. Under the new contracts the DSIs' entitlement to power was to be the same as under the old contracts, but the DSIs had to pay a higher price for it.

IMMIGRATION AND NATURALIZATION SERVICE *v.* STEVIC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-973. Argued December 6, 1983—Decided June 5, 1984

After he was ordered to surrender for deportation, respondent alien in 1977 moved to reopen the deportation proceedings, seeking relief under § 243(h) of the Immigration and Nationality Act of 1952 (INA), which then authorized the Attorney General to withhold deportation of an alien upon a finding that the alien "would be subject to persecution" in the country to which he would be deported. The Immigration Judge denied the motion without a hearing, and was upheld by the Board of Immigration Appeals (BIA), which held that respondent had not met his burden of showing that there was a clear probability of persecution. Respondent did not appeal this decision. Subsequently, in 1981, after receiving another notice to surrender for deportation, respondent filed a second motion to reopen, again seeking relief under § 243(h), which in the meantime had been amended by the Refugee Act of 1980—in conformity with the language of Article 33 of the 1968 United Nations Protocol Relating to the Status of Refugees that had been acceded to by the United States—to provide that the Attorney General shall not deport an alien if the Attorney General determines that the alien's "life or freedom would be threatened" in the country to which he would be deported. This motion was also denied without a hearing under the same standard of proof as was applied in the previous denial. The Court of Appeals reversed and remanded, holding that respondent no longer had the burden of showing "a clear probability of persecution," but instead could avoid deportation by showing a "well-founded fear of persecution," the latter language being contained in a definition of the term "refugee" adopted by the United Nations Protocol. The court concluded that the Refugee Act of 1980 so changed the standard of proof, and that respondent's showing entitled him to a hearing under the new standard.

Held: An alien must establish a clear probability of persecution to avoid deportation under § 243(h). Pp. 413-430.

(a) At least before 1968, it was clear that an alien was required to demonstrate a "clear probability of persecution" or a "likelihood of persecution" to be eligible for withholding of deportation under § 243(h). Relief under § 243(h) was not, however, available to aliens at the border seeking refuge in the United States due to persecution. They could seek admission only under § 203(a)(7) of the INA, and were required to establish a good reason to fear persecution. The legislative history of the United States' accession to the United Nations Protocol discloses that the President and Senate believed that the Protocol was consistent with existing law. While the Protocol was the source of some controversy with respect to the standard of proof for § 243(h) claims for withholding of deportation, the accession to the Protocol did not appear to raise any questions concerning the standard to be applied for § 203(a)(7) requests for admission, the "good reason to fear persecution" language being employed in such cases. Pp. 414–420.

(b) While the text of § 243(h), as amended in 1980, does not specify how great a possibility of persecution must exist to qualify an alien for withholding of deportation, to the extent a standard can be inferred from the bare language, it appears that a likelihood of persecution is required. The section provides for a withholding of deportation only if the alien's life or freedom "would" be threatened, not if he "might" or "could" be subject to persecution. Respondent is seeking relief under § 243(h), not under provisions which, as amended by the Refugee Act, employ the "well-founded fear" standard that now appears in § 201(a)(42)(A) of the INA and that was adopted from the United Nations Protocol's definition of "refugee." Section 243(h) does not refer to § 201(a)(42)(A). Hence, there is no textual basis in the statute for concluding that the well-founded-fear-of-persecution standard is relevant to the withholding of deportation under § 243(h). The 1980 amendment of § 243(h) was recognized by Congress as a mere conforming amendment, added "for the sake of clarity," and was plainly not intended to change the standard for withholding deportation. There is no support in either § 243(h)'s language, the structure of the amended INA, or the legislative history for the Court of Appeals' conclusion that every alien who qualifies as a "refugee" under the statutory definition is also entitled to a withholding of deportation under § 243(h). The Court of Appeals granted respondent relief based on its understanding of a standard which, even if properly understood, does not entitle an alien to withholding of deportation under § 243(h). Pp. 421–430.

678 F. 2d 401, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, and *Barbara E. Etkind.*

Ann L. Ritter argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

For over 30 years the Attorney General has possessed statutory authority to withhold the deportation of an alien upon a finding that the alien would be subject to persecution in the country to which he would be deported. The question presented by this case is whether a deportable alien must demonstrate a clear probability of persecution in order to obtain such relief under § 243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1253(h), as amended by § 203(e) of the Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 107.

I

Respondent, a Yugloslavian citizen, entered the United States in 1976 to visit his sister, then a permanent resident alien residing in Chicago. Petitioner, the Immigration and Naturalization Service (INS), instituted deportation proceedings against respondent when he overstayed his 6-week period of admission. Respondent admitted that he was deportable and agreed to depart voluntarily by February 1977. In January 1977, however, respondent married a United States citizen who obtained approval of a visa petition on his behalf. Shortly thereafter, respondent's wife died in an automobile accident. The approval of respondent's visa petition was

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne, E. Richard Larson,* and *David Carliner;* for the American Immigration Lawyers Association by *Theodore Ruthizer;* for the American Jewish Committee et al. by *Samuel Rabinove;* for Amnesty International USA by *Paul L. Hoffman;* for the Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies for Foreign Service et al. by *William T. Lake;* for the Lawyers Committee for International Human Rights by *Arthur C. Helton;* for the National Immigration Project of the National Lawyers Guild, Inc., by *Donald L. Ungar;* and for the United Nations High Commissioner for Refugees by *David B. Robinson.*

automatically revoked, and petitioner ordered respondent to surrender for deportation to Yugolslavia.

Respondent moved to reopen the deportation proceedings in August 1977, seeking relief under § 243(h) of the Immigration and Naturalization Act, which then provided:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason." 8 U. S. C. § 1253(h) (1976 ed.).

Respondent's supporting affidavit stated that he had become active in an anti-Communist organization after his marriage in early 1977, that his father-in-law had been imprisoned in Yugoslavia because of membership in that organization, and that he feared imprisonment upon his return to Yugoslavia.

In October 1979, the Immigration Judge denied respondent's motion to reopen without conducting an evidentiary hearing.[1] The Board of Immigration Appeals (BIA) upheld that action, explaining:

> "A Motion to reopen based on a section 243 (h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See *Cheng Kai Fu* v. *INS*, 386 F. 2d 750 (2 Cir. 1967), cert. denied, 390 U. S. 1003 (1968). Although the applicant here claims to be eligible for withholding of deportation which was not available to him at the time of his deportation hearing, he has not

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[1] The Immigration Judge's decision stated:

"The policy of restricting favorable exercise of discretion to cases of *clear probability of persecution of the particular individual has been sanctioned by the courts (Lena* v. *Immigration and Naturalization Service.* 379 F 2nd 536[,] 538 (7th Cir. 1967). The respondent has submitted no substantial evidence that he would be subjected to persecution as that term is defined by the court." Brief for Respondent 6–7.

> presented any evidence which would indicate that he will be singled out for persecution." App. to Pet. for Cert. 34–35.

Respondent did not seek judicial review of that decision.

After receiving notice to surrender for deportation in February 1981, respondent filed his second motion to reopen.[2] He again sought relief pursuant to § 243(h) which then—because of its amendment in 1980—read as follows:

> "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. § 1253(h)(1).

Although additional written material was submitted in support of the second motion, like the first, it was denied without a hearing. The Board of Immigration Appeals held that respondent had not shown that the additional evidence was unavailable at the time his first motion had been filed and, further, that he had still failed to submit prima facie evidence that "there is a clear probability of persecution" directed at respondent individually.[3] Thus, the Board applied the same

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[2] He did not voluntarily respond to that notice; moreover, after his apprehension, he unsuccessfully tried to escape from custody. These events gave rise to a habeas corpus petition raising separate issues that are not before us now.

[3] The opinion of the BIA stated, in part:

"Accordingly, we find that the respondent has failed to comply with the provisions of 8 CFR 3.2 in that there has been no showing that the submitted material was not available nor could not have been discovered or presented at a former hearing.

"In addition, we also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai* standard of proof it had applied regarding respondent's first motion to reopen, notwithstanding the intervening amendment of § 243(h) in 1980.

The United States Court of Appeals for the Second Circuit reversed and remanded for a plenary hearing under a different standard of proof. *Stevic* v. *Sava*, 678 F. 2d 401 (1982). Specifically, it held that respondent no longer had the burden of showing "a clear probability of persecution," but instead could avoid deportation by demonstrating a "well-founded fear of persecution." The latter language is contained in a definition of the term "refugee" adopted by a United Nations Protocol to which the United States has adhered since 1968. The Court of Appeals held that the Refugee Act of 1980 changed the standard of proof that an alien must satisfy to obtain relief under § 243(h), concluding that Congress intended to abandon the "clear probability of persecution" standard and substitute the "well-founded fear of persecution" language of the Protocol as the standard. Other than stating that the Protocol language was "considerably more generous" or "somewhat more generous" to the alien than the former standard, *id.*, at 405, 406, the court did not detail the

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Fu v. *INS*, 386 F. 2d 750 (2 Cir. 1967), cert. denied, 390 U. S. 1003 (1968); *Matter of McMullen*, Interim Decision 2831 (BIA 1981).

"In the instant case, the many journalistic articles submitted by the respondent are of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to the respondent. The affidavits and petitions contained in the file, while they conclude that the respondent will be imprisoned if he returns to Yugoslavia, do not contain any supporting facts. They express an opinion but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia.

"With regard to the respondent's allegation that he will be persecuted by Albanian ethnics in Gnjilane, we find that there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to country *[sic]*, not a city or province. *Lavdas* v. *Holland*, 235 F. 2d 955 (3 Cir. 1956); *Cantisani* v. *Holton*, 248 F. 2d 737 (7 Cir. 1957)." App. to Pet. for Cert. 30a–31a.

differences between them and stated that it "would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol," *id.*, at 409. The court concluded that respondent's showing entitled him to a hearing under the new standard.

Because of the importance of the question presented, and because of the conflict in the Circuits on the question,[4] we granted certiorari, 460 U. S. 1010 (1983). We now reverse and hold that an alien must establish a clear probability of persecution to avoid deportation under § 243(h).

II

The basic contentions of the parties in this case may be summarized briefly. Petitioner contends that the words "clear probability of persecution" and "well-founded fear of persecution" are not self-explanatory and when read in the light of their usage by courts prior to adoption of the Refugee Act of 1980, it is obvious that there is no "significant" difference between them. If there is a "significant" difference between them, however, petitioner argues that Congress' clear intent in enacting the Refugee Act of 1980 was to maintain the status quo, which petitioner argues would mean continued application of the clear-probability-of-persecution standard to withholding of deportation claims. In this regard, petitioner maintains that our accession to the United Nations Protocol in 1968 was based on the express "understanding" that it would not alter the "substance" of our immigration laws.

Respondent argues that the standards are not coterminous and that the well-founded-fear-of-persecution standard turns almost entirely on the alien's state of mind. Respondent points out that the well-founded-fear language was adopted in the definition of a refugee contained in the United Nations Protocol adhered to by the United States since 1968. Respondent basically contends that ever since 1968, the well-founded-fear standard should have applied to withholding of deportation claims, but Congress simply failed to honor the Protocol by failing to enact implementing legislation until adoption of the Refugee Act of 1980, which contains the Protocol definition of refugee.

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[4] Compare *Rejaie* v. *INS*, 691 F. 2d 139 (CA3 1982), with *Reyes* v. *INS*, 693 F. 2d 597 (CA6 1982) (relying on decision under review).

Each party is plainly correct in one regard: in 1980 Congress intended to adopt a standard for withholding of deportation claims by reference to pre-existing sources of law. We begin our analysis of this case by examining those sources of law.

III

United States Refugee Law prior to 1968

Legislation enacted by the Congress in 1950,[5] 1952,[6] and 1965[7] authorized the Attorney General to withhold deportation of an otherwise deportable alien if the alien would be subject to persecution upon deportation. At least before 1968, it was clear that an alien was required to demonstrate a "clear probability of persecution" or a "likelihood of persecution" in order to be eligible for withholding of deportation under § 243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1253(h) (1964 ed.). *E. g., Cheng Kai Fu* v. *INS*, 386 F. 2d 750, 753 (CA2 1967), cert. denied, 390 U. S. 1003 (1968); *Lena* v. *INS*, 379 F. 2d 536, 538 (CA7 1967); *In re Janus and Janek*, 12 I. & N. Dec. 866, 873 (BIA 1968); *In re Kojoory*, 12 I. & N. Dec. 215, 220 (BIA 1967). With certain exceptions, this relief was available to any alien who was already "within the United States," albeit unlawfully and subject to deportation.

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[5] Section 23 of the Subversive Activities Control Act of 1950 amended § 20 of the Immigration Act of February 5, 1917, to rewrite the deportation provisions and specifically to add a new § 20(a) which provided in part as follows:

"No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." 64 Stat. 1010.

[6] Section 243(h) of the Immigration and Nationality Act of 1952 provided as follows:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." 66 Stat. 214.

[7] That amendment read as follows:

"(f) Section 243(h) is amended by striking out 'physical persecution' and inserting in lieu thereof 'persecution on account of race, religion, or political opinion.'" §10, 79 Stat. 918.

The provision as revised in 1965 is quoted in the text, *supra*, at 410.

The relief authorized by § 243(h) was not, however, available to aliens at the border seeking refuge in the United States due to persecution. See generally *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958). Since 1947, relief to refugees at our borders has taken the form of an

> "immigration and naturalization policy which granted immigration preferences to 'displaced persons,' 'refugees,' or persons who fled certain areas of the world because of 'persecution or fear of persecution on account of race, religion, or political opinion.' Although the language through which Congress has implemented this policy since 1947 has changed slightly from time to time, the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations." *Rosenberg* v. *Yee Chien Woo*, 402 U. S. 49, 52 (1971).

Most significantly, the Attorney General was authorized under § 203(a)(7) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1153(a)(7)(A)(i) (1976 ed.), to permit "conditional entry" as immigrants for a number of refugees fleeing from a Communist-dominated area or the Middle East "because of persecution or fear of persecution on account of race, religion, or political opinion." See also § 212(d)(5) of the Act, 8 U. S. C. § 1182(d)(5) (granting Attorney General discretion to "parole" aliens into the United States temporarily for emergency reasons). An alien seeking admission under § 203(a)(7) was required to establish a good reason to fear persecution. Compare *In re Tan*, 12 I. & N. Dec. 564, 569–570 (BIA 1967), with *In re Ugricic*, 14 I. & N. Dec. 384, 385–386 (Dist. Dir. 1972).[8]

The United Nations Protocol

In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U. S. T. 6223, T. I. A. S. No. 6577. The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U. N. T. S. 150 (July 28, 1951)[9] with respect to "refugees" as defined in Article 1.2 of the Protocol.

Article 1.2 of the Protocol defines a "refugee" as an individual who

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

Compare 19 U. S. T. 6225 with 19 U. S. T. 6261 (1968).

Two of the substantive provisions of the Convention are germane to the issue before us. Article 33.1 of the Convention provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 19 U. S. T., at 6276. Article 34 provides in pertinent part: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. . . ." *Ibid.*[10]

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[8] Notably, during this period of time, neither immigration judges nor the Board of Immigration Appeals had jurisdiction over asylum claims under § 203(a)(7). While the Board had jurisdiction over § 243(h) requests for withholding of deportation, § 203(a)(7) claims for asylum rested in the jurisdiction of Immigration and Naturalization Service District Directors. See generally *In re Lam*, Interim Dec. No. 2857, p. 5, n. 4 (BIA, Mar. 24, 1981).

[9] The United States is not a signatory to the Convention itself.

The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol. *E. g.*, S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); *id.*, at 6, 7 ("the United States already meets the standards of the Protocol"); see also, *id.*, at 2; S. Exec. K, 90th Cong., 2d Sess., III, VII (1968); 114 Cong. Rec. 29391 (1968) (remarks of Sen. Mansfield); *id.*, at 27757 (remarks of Sen. Proxmire). And it was "absolutely clear" that the Protocol would not "requir[e] the United States to admit new categories or numbers of aliens." S. Exec. Rep. No. 14, *supra*, at 19. It was also believed that apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language. See, *e. g.*, S. Exec. K, *supra*, at VIII.

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[10] Article 32.1 of the Convention provides: "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." 19 U. S. T., at 6275. It seems plain that respondent could not invoke Article 32, since he was not lawfully in the country when he overstayed his period of admission. United Nations Economic and Social Council, Report of Ad Hoc Committee on Statelessness and Related Problems 47 (Mar. 2, 1950) (U. N. Doc. E/1618/Corr.1; E/AC.32/5/Corr.1) ("The expression 'lawfully within their territory' throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay"); see also United Nations Economic and Social Council, Report of Ad Hoc Committee on Statelessness and Related Problems, Second Session 11, ¶20 (Aug. 25, 1950) (U. N. Doc. E/1850; E/AC.32/8). Accord, *In re Dunar*, 14 I. & N. Dec. 310, 315–318 (BIA 1973) (citing additional authority).

United States Refugee Law: 1968–1980

Five years after the United States' accession to the Protocol, the Board of Immigration Appeals was confronted with the same basic issue confronting us today in the case of *In re Dunar*, 14 I. & N. Dec. 310 (1973). The deportee argued that he was entitled to withholding of deportation upon a showing of a well-founded fear of persecution, and essentially maintained that a conjectural possibility of persecution would suffice to make the fear "well founded." The Board rejected that interpretation of "well founded," and stated that a likelihood of persecution was required for the fear to be "well founded." *Id.*, at 319. It observed that neither § 243(h) nor Article 33 used the term "well-founded fear," and stated:

> "Article 33 speaks in terms of threat to life or freedom on account of any of the five enumerated reasons. Such threats would also constitute subjection to persecution within the purview of section 243(h). The latter has also been construed to encompass economic sanctions sufficiently harsh to constitute a threat to life or freedom, *Dunat* v. *Hurney*, 297 F. 2d 744 (3 Cir., 1962); cf. *Kovac* v. *INS*, 407 F. 2d 102 (9 Cir., 1969). In our estimation, there is no substantial difference in coverage of section 243(h) and Article 33. We are satisfied that distinctions in terminology can be reconciled on a case-by-case consideration as they arise." *Id.*, at 320.

The Board concluded that "Article 33 has effected no substantial changes in the application of section 243(h), either by way of burden of proof, coverage, or manner of arriving at decisions," *id.*, at 323,[11] and stated that Dunar had failed to establish "the likelihood that he would be persecuted . . . . Even if we apply the nomenclature of Articles 1 and 33, we are satisfied that respondent has failed to show a well-founded fear that his life or freedom will be threatened," *id.*, at 324.

Although before *In re Dunar*, the Board and the courts had consistently used a clear-probability or likelihood standard under § 243(h), after that case the term "well-founded fear" was employed in some cases.[12] The Court of Appeals for the Seventh Circuit, which had construed § 243(h) as applying only to "cases of clear probability of persecution" in a frequently cited case decided before 1968, *Lena* v. *INS*, 379 F. 2d 536, 538 (1967), reached the same conclusion in a case decided after the United States' adherence to the Protocol. *Kashani* v. *INS*, 547 F. 2d 376 (1977). In that opinion Judge Swygert reasoned that the "well founded fear of persecution" language could "only be satisfied by objective evidence," and that it would "in practice converge" with the "clear probability" standard that the Seventh Circuit had previously "engrafted onto [§]243(h)." *Id.*, at 379. Other Courts of Appeals appeared to reach essentially the same conclusion. See *e. g.*, *Fleurinor* v. *INS*, 585 F. 2d 129, 132, 134 (CA5 1978); *Pereira-Diaz* v. *INS*, 551 F. 2d 1149, 1154 (CA9 1977); *Zamora* v. *INS*, 534 F. 2d 1055, 1058, 1063 (CA2 1976).

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[11] The Board observed that the Attorney General had consistently granted withholding under § 243(h) when the required showing was made. *Id.*, at 321–322.

[12] See, *e. g.*, *Fleurinor* v. *INS*, 585 F. 2d 129, 132–134 (CA5 1978) ("well-founded fear" used by Immigration Judge; "likelihood" and "probable persecution" used by court); *Martineau* v. *INS*, 556 F. 2d 306, 307, and n. 2 (CA5 1977) ("'clear probability' of persecution" and "likelihood of persecution"); *Henry* v. *INS*, 552 F. 2d 130, 131–132 (CA5 1977) ("probable persecution," "reason to fear persecution" and "well-grounded fear of political persecution"); *Pereira-Diaz* v. *INS*, 551 F. 2d 1149, 1154 (CA9 1977) ("well-founded fear"); *Coriolan* v. *INS*, 559 F. 2d 993, 997, and n. 8 (CA5 1977) ("well-founded fear that . . . lives or freedom will be threatened" used by Board); *Zamora* v. *INS*, 534 F. 2d 1055, 1058 (CA2 1976) ("likelihood of persecution" used by court, "well-founded fear" used by Board); *Daniel* v. *INS*, 528 F. 2d 1278, 1279 (CA5 1976) ("probability of persecution"); *Paul* v. *INS*, 521 F. 2d 194, 200, and n. 11 (CA5 1975) ("well-founded fear of political persecution"); *Gena* v. *INS*, 424 F. 2d 227, 232 (CA5 1970) ("likely to be persecuted"); *Kovac* v. *INS*, 407 F. 2d 102, 105, 107 (CA9 1969) ("probability of persecution" and "likelihood"); *In re Williams*, 16 I. & N. Dec. 697, 700–702, 704 (BIA 1979) ("well-founded fear," "'probable persecution'" and "likelihood of persecution"); *In re Francois*, 15 I. & N. Dec. 534, 539 (BIA 1975) ("well-founded fear that . . . life or freedom will be threatened"); *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974) ("well-founded . . . fear of persecution"); *In re Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) ("reasonable fear" and "well-founded fear"); *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973) ("well-founded fear of persecution").

While the Protocol was the source of some controversy with respect to the standard for § 243(h) claims for withholding of deportation, the United States' accession did not appear to raise any questions concerning the standard to be applied for § 203(a)(7) requests for admission. The "good reason to fear persecution" language was employed in such cases. See, *e. g.*, *In re Ugricic*, 14 I. & N. Dec., at 385–386.[13]

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[13] The ideological and geographic restrictions of § 203(a)(7) itself were not altered after the United States' accession to the Protocol. The Attorney General continued during this period to use his authority under § 212(d) to parole refugees into the United States. Moreover, in 1974, the Attorney General, acting pursuant to his general authority under 8 U. S. C. § 1103, published regulations permitting applications for asylum to be made to an INS District Director or American consul. 8 CFR § 108.1 (1976). The regulations did not explicitly adopt a standard for the exercise of discretion on the application, but did provide that a denial of an asylum application "shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees." 8 CFR § 108.2 (1976).

In 1979, these regulations were amended to provide that a request for asylum made by an alien after commencement of deportation proceedings, or after completion of deportation proceedings, would be considered as a request for withholding or a request to reopen, respectively, "under sec-

IV

Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol.[14] The amendment made three changes in the text of § 243(h), but none of these three changes expressly governs the standard of proof an applicant must satisfy or implicitly changes that standard.[15] The amended § 243(h), like Article 33, makes no mention of a probability of persecution or a well-founded fear of persecution. In short, the text of the statute simply does not specify

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tion 243(h) of the Act and for the benefits of Articles 32 and 33 of the Convention Relating to the Status of Refugees." 8 CFR §§ 108.3(a) and (b) (1980). This amendment had the effect of conferring jurisdiction over asylum requests on the Board for the first time. See *In re Lam*, Interim Dec. No. 2857, p. 5, n. 4 (BIA, Mar. 24, 1981). While rejection of an asylum request by an INS District Director or American consul still did not "preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees," 8 CFR § 108.2 (1980), it appears that requests for asylum were to be judged by the same likelihood-of-persecution standard applicable to § 243(h) claims. Compare § 108.1 with § 108.3(a), § 108.3(b), and § 242.17(c).

[14] Compare *supra*, at 411, with *supra*, at 416–417.

[15] The amendment (1) substituted mandatory language for what was previously a grant of discretionary authority to the Attorney General to withhold deportation after making the required finding; (2) substituted a requirement that the Attorney General determine that the "alien's life or freedom would be threatened" for the previous requirement that the alien "would be subject to persecution," and (3) broadened the relevant causes of persecution from reasons "of race, religion or political opinion" to encompass "nationality" and "membership in a particular social group" as well.

The removal of the Attorney General's discretion to withhold deportation after persecution was established with the requisite degree of certainty relates to the consequences of meeting the standard, and not to the standard itself.

While it might be argued that the second and third changes in the text altered the substantive grounds one needs to establish to be entitled to withholding of deportation, contra, *infra*, at 425–428, neither indicates any diminution in the degree of certainty with which those grounds must be established.

how great a possibility of persecution must exist to qualify the alien for withholding of deportation. To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required.[16] The section literally provides for withholding of deportation only if the alien's life or freedom "would" be threatened in the country to which he would be deported; it does not require withholding if the alien "might" or "could" be subject to persecution. Finally, § 243(h), both prior to and after amendment, makes no mention of the term "refugee"; rather, any alien within the United States is entitled to withholding if he meets the standard set forth.

Respondent understandably does not rely upon the specific textual changes in § 243(h) in support of his position that a well-founded fear of persecution entitles him to withholding of deportation. Instead, respondent points to the provision of the Refugee Act which eliminated the ideological and geographical restrictions on admission of refugees under § 203(a)(7) and adopted an expanded version of the United Nations Protocol definition of "refugee." This definition contains the well-founded-fear language and now appears under § 101(a)(42)(A) of the Immigration and Nationality Act, 8 U. S. C. § 1101(a)(42)(A). Other provisions of the Immigration and Nationality Act, as amended, now provide preferential immigration status, within numerical limits, to those qualifying as refugees under the modified Protocol definition[17] and renders a more limited class of refugees, though still a class broader than the Protocol definition, eligible for a discretionary grant of asylum.[18]

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[16] Nothwithstanding the amendment of § 243(h), the regulation governing withholding of deportation claims remains substantively the same: in order to be entitled to a withholding of deportation, the alien "has the burden of satisfying the special inquiry officer that he would be subject to persecution . . . ," 8 CFR § 242.17(c) (1983), and the Board of Immigration Appeals, of course, continues to apply a clear-probability or likelihood-of-persecution standard with respect to such claims, as it did in this case.

[17] Under an amended § 207, the Attorney General may, within numerical limits, permit aliens who are overseas to immigrate into the United States

Respondent, however, is not seeking discretionary relief under these provisions, which explicitly employ the well-founded-fear standard now appearing in § 101(a)(42)(A). Rather, he claims he is entitled to withholding of deportation under § 243(h) upon establishing a well-founded fear of persecution. Section 243(h), however, does *not* refer to § 101(a)(42)(A). Hence, there is no textual basis in the statute for concluding that the well-founded-fear-of-persecution

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on the ground of their status as refugees under § 101(a)(42). 8 U. S. C. § 1157. Refugees admitted under § 207, after one year of residence and successful reinspection, attain permanent resident alien status under § 209 of the amended Act. 8 U. S. C. § 1159.

[18] A new § 208(a) directed the Attorney General to establish procedures permitting aliens either in the United States or at our borders to apply for "asylum." 8 U. S. C. § 1158(a). Under § 208(a), in order to be eligible for asylum, an alien must meet the definition of "refugee" contained in § 101(a)(42)(A), a standard that also would qualify an alien seeking to immigrate under § 207. Meeting the definition of "refugee," however, does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a).

After passage of the Refugee Act, regulations relating to asylum previously contained in 8 CFR § 108 were repealed, and regulations were promulgated under the new § 208 of the Act. Those regulations, like the statute, expressly provide that a "well-founded fear of persecution" renders an alien eligible for a discretionary grant of asylum under § 208. 8 CFR § 208.5 (1983).

We note that when such asylum requests are made after the institution of deportation proceedings, they "shall *also* be considered as requests" under § 243(h). 8 CFR § 208.3(b) (1983) (emphasis supplied). This does not mean that the well-founded-fear standard is applicable to § 243(h) claims. Section 208.3(b) simply does not speak to the burden of proof issue; rather, it merely eliminates the need for filing a separate request for § 243(h) relief if a § 208 claim has been made. We further note that a § 243(h) request is not automatically also considered as a § 208 request under the regulations. Indeed, the alien may be barred from asserting a § 208 claim while still allowed to invoke § 243(h). See 8 CFR § 208.11 (1983).

standard is relevant to a withholding of deportation claim under § 243(h).

Before examining the legislative history of the Refugee Act of 1980 in order to ascertain whether Congress nevertheless intended a well-founded-fear standard to be employed under § 243(h), we observe that the Refugee Act itself does not contain any definition of the "well-founded fear of persecution" language contained in § 101(a)(42)(A). The parties vigorously contest whether the well-founded-fear standard is coterminous with the clear-probability-of-persecution standard.

Initially, we do not think there is any serious dispute regarding the meaning of the clear-probability standard under the § 243(h) case law.[19] The question under that standard is whether it is more likely than not that the alien would be subject to persecution. The argument of the parties on this point is whether the well-founded-fear standard is the same as the clear-probability standard as just defined, or whether it is more generous to the alien.

Petitioner argues that persecution must be more likely than not for a fear of persecution to be considered "well founded." The positions of respondent and several *amici curiae* are somewhat amorphous. Respondent seems to maintain that a fear of persecution is "well founded" if the evidence establishes some objective basis in reality for the fear. This would appear to mean that so long as the fear is not imaginary—*i. e.*, if it is founded in reality at all—it is "well founded." A more moderate position is that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.

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[19] The term "clear probability" was used interchangeably with "likelihood"; the use of the word "clear" appears to have been surplusage. We think there is no merit to the suggestion that the Board was applying a "clear and convincing" standard to the persecution issue. See generally *Addington* v. *Texas*, 441 U. S. 418, 423–425 (1979). The Board is, of course, quite familiar with the clear-and-convincing standard, since the Government is held to that standard in deportation proceedings. *Woodby* v. *INS*, 385 U. S. 276 (1966).

Petitioner and respondent seem to agree that prior to passage of the Refugee Act, the Board and the courts actually used a clear-probability standard for § 243(h) claims. That is, prior to the amendment, § 243(h) relief would be granted if the evidence established that it was more likely than not that the alien would be persecuted in the country to which he was being deported; relief would not be granted merely upon a showing of some basis in reality for the fear, or if there was only a reasonable possibility of persecution falling short of a probability. Petitioner argues that some of the prior case law using the term "well-founded fear" simply used that term interchangeably with the phrase "clear probability." Respondent agrees in substance, but argues that although prior cases employed the term "well-founded fear," they misconstrued the meaning of the term under the United Nations Protocol.

For purposes of our analysis, we may assume, as the Court of Appeals concluded, that the well-founded-fear standard is more generous than the clear-probability-of-persecution standard because we can identify no basis in the legislative history for applying that standard in § 243(h) proceedings or any legislative intent to alter the pre-existing practice.

The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States. The primary substantive change Congress intended to make under the Refugee Act, and indeed in our view the only substantive change even relevant to this case, was to eliminate the piecemeal approach to *admission* of refugees previously existing under § 203(a)(7) and § 212(d)(5) of the Immigration and Nationality Act, and § 108 of the regulations, and to establish a systematic scheme for admission and resettlement of refugees. S. Rep. No. 96–256, p. 1 (1979) (S. Rep.); H. R. Rep. No. 96–608, pp. 1–5 (1979) (H. R.

Rep.). The Act adopted, and indeed, expanded upon, the Protocol definition of "refugee," S. Rep., at 19; H. R. Rep., at 9–10, and intended that the definition would be construed consistently with the Protocol, S. Rep., at 9, 20. It was plainly recognized, however, that "merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the United States. The Committee is of the opinion that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and practices that have been followed in recent years." H. R. Rep., at 10. The Congress distinguished between discretionary grants of refugee admission or asylum and the entitlement to a withholding of deportation if the § 243(h) standard was met. See *id.*, at 17–18.[20]

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[20] The House Judiciary Committee Report stated:

"*Asylum and Withholding of Deportation*

"Since 1968, the United States has been a party to the United States Refugee Protocol which incorporates the substance of the 1951 U.N. Convention of Refugees and which seeks to insure fair and humane treatment for refugees within the territory of the contracting states.

"Article 33 of the Convention, with certain exceptions, prohibits contracting states from expelling or returning a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. *The Committee Amendment conforms United States statutory law to our obligations under Article 33 in two of its provisions:*

"(1) *Asylum.*—The Committee Amendment establishes for the first time a provision in Federal law specifically relating to asylum. . . .

"Currently, United States asylum procedures are governed by regulations promulgated by the Attorney General under the authority of section 103 of the Immigration and Nationality Act (see 8 CFR 108), which grants the Attorney General authority to administer and enforce laws relating to immigration. No specific statutory basis for United States asylum policy currently exists. The asylum provision of this legislation would provide such a basis.

"The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, Elimination of the geographic and ideological restrictions under the former § 203(a)(7) was thought to bring the United States' scheme into conformity with its obligations under the Protocol, see S. Rep., at 4, 15–16,[21] and in our view these references are to the United States' obligations under Article 34 to facilitate the naturalization of refugees within the definition of the Protocol. There is, as always, some ambiguity in the legislative history—the term "asylum," in particular, seems to be used in various ways, see, *e. g.*, S. Rep., at 9, 16—but that is understandable given that the same problem with nomenclature has been evident in case law as well. See *In re Lam*, Interim Dec. No. 2857, p. 5 (BIA, Mar. 24, 1981).

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and feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation. . . .

"(2) *Withholding of Deportation.*—Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

"*Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.* This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

"*As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U. S. statutory law clearly reflects our legal obligations under international agreements.*" H. R. Rep., at 17–18 (emphasis supplied).

[21] "As amended by the Committee, the bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November [1968]." S. Rep., at 9.

Going to the substance of the matter, however, it seems clear that Congress understood that refugee status alone did not require withholding of deportation, but rather, the alien had to satisfy the standard under § 243(h), S. Rep., at 16. The amendment of § 243(h) was explicitly recognized to be a mere conforming amendment, added "for the sake of clarity," and was plainly not intended to change the standard. H. R. Rep., at 17–18.

The Court of Appeals' decision rests on the mistaken premise that every alien who qualifies as a "refugee" under the statutory definition is also entitled to a withholding of deportation under § 243(h). We find no support for this conclusion in either the language of § 243(h), the structure of the amended Act, or the legislative history.[22]

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[22] Nor is there any merit to respondent's argument that this construction is inconsistent with the Protocol. Existing domestic statutory law in 1968 was largely consistent with the Protocol. Under the Protocol, however, attaining the status of "refugee" was essential in order for an alien to assert his right under Article 33 to avoid deportation, and then he was protected only against deportation to a territory where his "life or freedom" would be threatened. Under our statutory scheme, on the other hand, no alien in the United States would be deported to a country where he was likely to be "persecuted," a seemingly broader concept than threats to "life or freedom." In addition, the alien would qualify for withholding even if he might not be a "refugee" under the Protocol because, for example, he was not outside his country of nationality owing to a fear of persecution. Cf. *Rosenberg* v. *Yee Chien Woo,* 402 U. S. 49, 57 (1971). Moreover, the domestic statute and regulations provided many additional procedural safeguards as well, including a right to be represented by counsel and a right to judicial review.

While refugee status was not essential to avoid withholding of deportation, it was essential under domestic law to qualify for preferential immigration status. Our definition of a "refugee" under § 203(a)(7) was of course consistent with the Protocol. Indeed, the relevant statutory language virtually mirrored the Protocol definition. The geographic and ideological limitations were limits on admission. That was not inconsistent with the Protocol—the Protocol did not require admission at all, nor did it preclude a signatory from exercising judgment among classes of refugees within the Protocol definition in determining whom to admit. Article 34 merely

We have deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is more

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called on nations to facilitate the admission of refugees *to the extent possible;* the language of Article 34 was precatory and not self-executing. The point is not, however, that the Senate was merely led to *believe* accession would work no substantial change in the law; the point is that it did not work a substantial change in the law.

There were of course differences between the Protocol and the text of domestic law. The most significant difference was that Article 33 gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened, whereas domestic law merely provided the Attorney General with discretion to grant withholding of deportation on grounds of persecution. The Attorney General, however, could naturally accommodate the Protocol simply by exercising his discretion to grant such relief in each case in which the required showing was made, and hence no amendment of the existing statutory language was necessary. There were other differences between the Protocol and the text of domestic statutory law in 1968—*e. g.*, the Protocol provides protection for those persecuted on grounds of nationality and membership in social groups, as well as race, religion, or political opinion. Given our existing statutory provisions, and the considerable discretion an administrator such as the Attorney General possesses in interpreting and implementing such statutory provisions, once again, no amendment of the statute was necessary. Finally, the Protocol required a showing that the "refugee's life or freedom would be threatened," while § 243(h) required that the alien would be subject to "persecution." Although one might argue that the concept of "persecution" is broad enough to encompass matters other than threats to "life or freedom"—deprivations of property, for example—and therefore that the Protocol was narrower than the coverage of the section, we perceive no basis for concluding that the particular mention of the alien's interest in "life or freedom" made the Protocol any more generous than domestic law.

In summary, then, to the extent that domestic law was more generous than the Protocol, the Attorney General would not alter existing practice; to the extent that the Protocol was more generous than the bare text of § 243(h) would necessarily require, the Attorney General would honor the requirements of the Protocol and hence there was no need for modifying the language of § 243(h) itself. As the Secretary of State *correctly* explained at the time of consideration of the Protocol: "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to likely than not that the alien would be subject to persecution on one of the specified grounds. This standard is a familiar one to immigration authorities and reviewing courts, and Congress did not intend to alter it in 1980. We observe that shortly after adoption of the Refugee Act, the Board explained: "As we have only quite recently acquired jurisdiction over asylum claims, we are only just now beginning to resolve some of the problems caused by this addition to our jurisdiction, including the problem of determining exactly how withholding of deportation and asylum are to fit together." *In re Lam*, Interim Dec. No. 2857, p. 6, n. 4 (BIA, Mar. 24, 1981). Today we resolve one of those problems by deciding that the "clear probability of persecution" standard remains applicable to § 243(h) withholding of deportation claims. We do not decide the meaning of the phrase "well-founded fear of persecution" which is applicable by the terms of the Act and regulations to requests for discretionary asylum. That issue is not presented by this case.

The Court of Appeals granted respondent relief based on its understanding of a standard which, even if properly understood, does not entitle an alien to withholding of deportation under § 243(h). Our holding does, of course, require the Court of Appeals to reexamine this record to determine whether the evidence submitted by respondent entitles him to a plenary hearing under the proper standard.

The judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

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any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act . . . and it can be implemented within the administrative discretion provided by existing regulations." S. Exec. K, 90th Cong., 2d Sess., VIII (1968).

NIX, WARDEN OF THE IOWA STATE PENITENTIARY v. WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1651. Argued January 18, 1984—Decided June 11, 1984

Following the disappearance of a 10-year-old girl in Des Moines, Iowa, respondent was arrested and arraigned in Davenport, Iowa. The police informed respondent's counsel that they would drive respondent back to Des Moines without questioning him, but during the trip one of the officers began a conversation with respondent that ultimately resulted in his making incriminating statements and directing the officers to the child's body. A systematic search of the area that was being conducted with the aid of 200 volunteers and that had been initiated before respondent made the incriminating statements was terminated when respondent guided police to the body. Before trial in an Iowa state court for first-degree murder, the court denied respondent's motion to suppress evidence of the body and all related evidence, including the body's condition as shown by an autopsy, respondent having contended that such evidence was the fruit of his illegally obtained statements made during the automobile ride. Respondent was convicted, and the Iowa Supreme Court affirmed, but later federal-court habeas corpus proceedings ultimately resulted in this Court's holding that the police had obtained respondent's incriminating statements through interrogation in violation of his Sixth Amendment right to counsel. *Brewer* v. *Williams*, 430 U. S. 387. However, it was noted that even though the statements could not be admitted at a second trial, evidence of the body's location and condition might be admissible on the theory that the body would have been discovered even if the incriminating statements had not been elicited from respondent. *Id.*, at 407, n. 12. At respondent's second state-court trial, his incriminating statements were not offered in evidence, nor did the prosecution seek to show that respondent had directed the police to the child's body. However, evidence concerning the body's location and condition was admitted, the court having concluded that the State had proved that if the search had continued the body would have been discovered within a short time in essentially the same condition as it was actually found. Respondent was again convicted of first-degree murder, and the Iowa Supreme Court affirmed. In subsequent habeas corpus proceedings, the Federal District Court, denying relief, also concluded that the body inevitably would have been found. However, the

Court of Appeals reversed, holding that—even assuming that there is an inevitable discovery exception to the exclusionary rule—the State had not met the exception's requirement that it be proved that the police did not act in bad faith.

Held: The evidence pertaining to the discovery and condition of the victim's body was properly admitted at respondent's second trial on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional provision had taken place. Pp. 440–450.

(a) The core rationale for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct is that such course is needed to deter police from violations of constitutional and statutory protections notwithstanding the high social cost of letting obviously guilty persons go unpunished. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired. By contrast, the independent source doctrine—allowing admission of evidence that has been discovered by means wholly independent of any constitutional violation—rests on the rationale that society's interest in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred. Although the independent source doctrine does not apply here, its rationale is wholly consistent with and justifies adoption of the ultimate or inevitable discovery exception to the exclusionary rule. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Pp. 441–444.

(b) Under the inevitable discovery exception, the prosecution is not required to prove the absence of bad faith, since such a requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. This would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired, and would fail to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. Pp. 445–446.

(c) There is no merit to respondent's contention that because he did not waive his right to the assistance of counsel, and because the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial, competing values may not be balanced in deciding whether the challenged evidence was properly admitted. Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice. Pp. 446–448.

(d) The record here supports the finding that the search party ultimately or inevitably would have discovered the victim's body. The evidence clearly shows that the searchers were approaching the actual location of the body, that the search would have been resumed had respondent not led the police to the body, and that the body inevitably would have been found. Pp. 448–450.

700 F. 2d 1164, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 450. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 451. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 458.

Brent R. Appel, Deputy Attorney General of Iowa, argued the cause for petitioner. With him on the briefs were *Thomas J. Miller*, Attorney General, and *Thomas D. McGrane*, Assistant Attorney General.

Kathryn A. Oberly argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Robert Bartels, by appointment of the Court, 462 U. S. 1129, argued the cause and filed briefs for respondent.*

James E. Duggan filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Paul P. Biebel, Jr.*, First Assistant Attorney General, *Steven F. Molo*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Charles A. Graddick* of Alabama, *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Jim Smith* of Florida, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*,

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether, at respondent Williams' second murder trial in state court, evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place.

I

A

On December 24, 1968, 10-year-old Pamela Powers disappeared from a YMCA building in Des Moines, Iowa, where she had accompanied her parents to watch an athletic contest. Shortly after she disappeared, Williams was seen leaving the YMCA carrying a large bundle wrapped in a blanket; a 14-year-old boy who had helped Williams open his car door reported that he had seen "two legs in it and they were skinny and white."

Williams' car was found the next day 160 miles east of Des Moines in Davenport, Iowa. Later several items of clothing belonging to the child, some of Williams' clothing, and an army blanket like the one used to wrap the bundle that Williams carried out of the YMCA were found at a rest stop on

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of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Brian McKay* of Nevada, *Gregory H. Smith* of New Hampshire, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *Michael Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Hector Reichard* of Puerto Rico, *Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.*, of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Gerald L. Baliles* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming; and for the Legal Foundation of America et al. by *David Crump*, *Wayne Schmidt*, and *James P. Manak*.

Interstate 80 near Grinnell, between Des Moines and Davenport. A warrant was issued for Williams' arrest.

Police surmised that Williams had left Pamela Powers or her body somewhere between Des Moines and the Grinnell rest stop where some of the young girl's clothing had been found. On December 26, the Iowa Bureau of Criminal Investigation initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden.

Meanwhile, Williams surrendered to local police in Davenport, where he was promptly arraigned. Williams contacted a Des Moines attorney who arranged for an attorney in Davenport to meet Williams at the Davenport police station. Des Moines police informed counsel they would pick Williams up in Davenport and return him to Des Moines without questioning him. Two Des Moines detectives then drove to Davenport, took Williams into custody, and proceeded to drive him back to Des Moines.

During the return trip, one of the policemen, Detective Leaming, began a conversation with Williams, saying:

> "I want to give you something to think about while we're traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. . . .

> [A]fter a snow storm [we may not be] able to find it at all."

Leaming told Williams he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines. He concluded the conversation by saying: "I do not want you to answer me. . . . Just think about it . . . ."

Later, as the police car approached Grinnell, Williams asked Leaming whether the police had found the young girl's shoes. After Leaming replied that he was unsure, Williams directed the police to a point near a service station where he said he had left the shoes; they were not found. As they continued the drive to Des Moines, Williams asked whether the blanket had been found and then directed the officers to a rest area in Grinnell where he said he had disposed of the blanket; they did not find the blanket. At this point Leaming and his party were joined by the officers in charge of the search. As they approached Mitchellville, Williams, without any further conversation, agreed to direct the officers to the child's body.

The officers directing the search had called off the search at 3 p. m., when they left the Grinnell Police Department to join Leaming at the rest area. At that time, one search team near the Jasper County-Polk County line was only two and one-half miles from where Williams soon guided Leaming and his party to the body. The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched.

B

First Trial

In February 1969 Williams was indicted for first-degree murder. Before trial in the Iowa court, his counsel moved to suppress evidence of the body and all related evidence including the condition of the body as shown by the autopsy. The ground for the motion was that such evidence was the "fruit" or product of Williams' statements made during the automobile ride from Davenport to Des Moines and prompted by Leaming's statements. The motion to suppress was denied.

The jury found Williams guilty of first-degree murder; the judgment of conviction was affirmed by the Iowa Supreme Court. *State* v. *Williams*, 182 N. W. 2d 396 (1970). Williams then sought release on habeas corpus in the United States District Court for the Southern District of Iowa. That court concluded that the evidence in question had been wrongly admitted at Williams' trial, *Williams* v. *Brewer*, 375 F. Supp. 170 (1974); a divided panel of the Court of Appeals for the Eighth Circuit agreed. 509 F. 2d 227 (1974).

We granted certiorari, 423 U. S. 1031 (1975), and a divided Court affirmed, holding that Detective Leaming had obtained incriminating statements from Williams by what was viewed as interrogation in violation of his right to counsel. *Brewer* v. *Williams*, 430 U. S. 387 (1977). This Court's opinion noted, however, that although Williams' incriminating statements could not be introduced into evidence at a second trial, evidence of the body's location and condition "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." *Id.*, at 407, n. 12.

C

Second Trial

At Williams' second trial in 1977 in the Iowa court, the prosecution did not offer Williams' statements into evidence, nor did it seek to show that Williams had directed the police to the child's body. However, evidence of the condition of her body as it was found, articles and photographs of her clothing, and the results of post mortem medical and chemical tests on the body were admitted. The trial court concluded that the State had proved by a preponderance of the evidence that, if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered "*within a short time*" in essentially the same condition as it was actually found. The trial court also ruled that if the police had not located the body, "the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would [have] been found *in short order*." App. 86 (emphasis added).

In finding that the body would have been discovered in essentially the same condition as it was actually found, the court noted that freezing temperatures had prevailed and tissue deterioration would have been suspended. *Id.*, at 87. The challenged evidence was admitted and the jury again found Williams guilty of first-degree murder; he was sentenced to life in prison.

On appeal, the Supreme Court of Iowa again affirmed. 285 N. W. 2d 248 (1979). That court held that there was in fact a "hypothetical independent source" exception to the exclusionary rule:

> "After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means." *Id.*, at 260.

As to the first element, the Iowa Supreme Court, having reviewed the relevant cases, stated:

> "The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith." *Id.*, at 260–261.

The Iowa court then reviewed the evidence *de novo*[1] and concluded that the State had shown by a preponderance of the evidence that, even if Williams had not guided police to the child's body, it would inevitably have been found by lawful activity of the search party before its condition had materially changed.

In 1980 Williams renewed his attack on the state-court conviction by seeking a writ of habeas corpus in the United States District Court for the Southern District of Iowa. The District Court conducted its own independent review of the evidence and concluded, as had the state courts, that the body would inevitably have been found by the searchers in essentially the same condition it was in when Williams led police to its discovery. The District Court denied Williams' petition. 528 F. Supp. 664 (1981).

The Court of Appeals for the Eighth Circuit reversed, 700 F. 2d 1164 (1983); an equally divided court denied rehearing en banc. *Id.*, at 1175. That court assumed, without deciding, that there is an inevitable discovery exception to the exclusionary rule and that the Iowa Supreme Court correctly stated that exception to require proof that the police did not act in bad faith and that the evidence would have been discovered absent any constitutional violation. In reversing the District Court's denial of habeas relief, the Court of Appeals stated:

> "We hold that the State has not met the first requirement. It is therefore unnecessary to decide whether the state courts' finding that the body would have been discovered anyway is fairly supported by the record. It is also unnecessary to decide whether the State must prove the two elements of the exception by clear and

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[1] Iowa law provides for *de novo* appellate review of factual as well as legal determinations in cases raising constitutional challenges. See, *e. g.*, *Armento* v. *Baughman*, 290 N. W. 2d 11, 15 (Iowa 1980); *State* v. *Ege*, 274 N. W. 2d 350, 352 (Iowa 1979).

> convincing evidence, as defendant argues, or by a preponderance of the evidence, as the state courts held.
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> "The state trial court, in denying the motion to suppress, made no finding one way or the other on the question of bad faith. Its opinion does not even mention the issue and seems to proceed on the assumption—contrary to the rule of law later laid down by the Supreme Court of Iowa—that the State needed to show only that the body would have been discovered in any event. The Iowa Supreme Court did expressly address the issue . . . and a finding by an appellate court of a state is entitled to the same presumption of correctness that attaches to trial-court findings under 28 U. S. C. § 2254(d). . . . We conclude, however, that the state Supreme Court's finding that the police did not act in bad faith is not entitled to the shield of § 2254(d) . . . ." *Id.*, at 1169–1170 (footnotes omitted).

We granted the State's petition for certiorari, 461 U. S. 956 (1983), and we reverse.

II

A

The Iowa Supreme Court correctly stated that the "vast majority" of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule.[2] We are now urged to adopt and apply the so-called ultimate or inevitable discovery exception to the exclusionary rule.

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[2] Every Federal Court of Appeals having jurisdiction over criminal matters, including the Eighth Circuit in a case decided after the instant case, has endorsed the inevitable discovery doctrine. See *Wayne* v. *United States*, 115 U. S. App. D. C. 234, 238, 318 F. 2d 205, 209, cert. denied, 375 U. S. 860 (1963); *United States* v. *Bienvenue*, 632 F. 2d 910, 914 (CA1 1980); *United States* v. *Fisher*, 700 F. 2d 780, 784 (CA2 1983); *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 927–928 (CA3 1974), cert. denied, 420 U. S. 909 (1975); *United States* v. *Seohnlein*, 423 F. 2d 1051, 1053 (CA4), cert. denied, 399 U. S. 913 (1970); *United States* v. *Brookins*, 614 F. 2d 1037, 1042, 1044 (CA5 1980); *Papp* v. *Jago*, 656 F. 2d 221, 222 (CA6 1981); *United States ex rel. Owens* v. *Twomey*, 508 F. 2d 858, 865–866 (CA7 1974); *United States* v. *Apker*, 705 F. 2d 293, 306–307 (CA8 1983);

Williams contends that evidence of the body's location and condition is "fruit of the poisonous tree," *i. e.*, the "fruit" or product of Detective Leaming's plea to help the child's parents give her "a Christian burial," which this Court had already held equated to interrogation. He contends that admitting the challenged evidence violated the Sixth Amendment whether it would have been inevitably discovered or not. Williams also contends that, if the inevitable discovery doctrine is constitutionally permissible, it must include a threshold showing of police good faith.

B

The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); there, the Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. The holding of *Silverthorne* was carefully limited, however, for the Court emphasized that such information does not automatically become "sacred and inaccessible." *Id.*, at 392.

> "If knowledge of [such facts] is gained from an *independent source*, they may be proved like any others . . . ." *Ibid.* (emphasis added).

Wong Sun v. *United States*, 371 U. S. 471 (1963), extended the exclusionary rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but there again the Court emphasized that evidence that has been illegally obtained need not always be suppressed, stating:

United States v. *Schmidt*, 573 F. 2d 1057, 1065–1066, n. 9 (CA9), cert. denied, 439 U. S. 881 (1978); *United States* v. *Romero*, 692 F. 2d 699, 704 (CA10 1982); *United States* v. *Roper*, 681 F. 2d 1354, 1358 (CA11 1982).

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for the illegal actions* of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.*, at 487–488 (emphasis added) (quoting J. Maguire, Evidence of Guilt 221 (1959)).

The Court thus pointedly negated the kind of good-faith requirement advanced by the Court of Appeals in reversing the District Court.

Although *Silverthorne* and *Wong Sun* involved violations of the Fourth Amendment, the "fruit of the poisonous tree" doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, see *United States* v. *Wade*, 388 U. S. 218 (1967), as well as of the Fifth Amendment.[3]

The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

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[3] In *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 79 (1964), the Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." The Court added, however, that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.*, at 79, n. 18; see *id.*, at 103 (WHITE, J., concurring). Application of the independent source doctrine in the Fifth Amendment context was reaffirmed in *Kastigar* v. *United States*, 406 U. S. 441, 460–461 (1972).

By contrast, the derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Leaming indeed led police to the child's body, but that is not the whole story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.[4] See *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 79 (1964); *Kastigar* v. *United States*, 406 U. S. 441, 457, 458–459 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.

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[4] The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18, 22 (1967). The harmless-constitutional-error rule "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.

It is clear that the cases implementing the exclusionary rule "begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity." *United States* v. *Crews*, 445 U. S. 463, 471 (1980) (emphasis added). Of course, this does not end the inquiry. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received.[5] Anything less would reject logic, experience, and common sense.

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[5] As to the quantum of proof, we have already established some relevant guidelines. In *United States* v. *Matlock*, 415 U. S. 164, 178, n. 14 (1974) (emphasis added), we stated that "the controlling burden of proof at suppression hearings should impose *no greater burden* than proof by a preponderance of the evidence." In *Lego* v. *Twomey*, 404 U. S. 477, 488 (1972), we observed "from our experience [that] no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence" and held that the prosecution must prove by a preponderance of the evidence that a confession sought to be used at trial was voluntary. We are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.

Williams argues that the preponderance-of-the-evidence standard used by the Iowa courts is inconsistent with *United States* v. *Wade*, 388 U. S. 218 (1967). In requiring clear and convincing evidence of an independent source for an in-court identification, the Court gave weight to the effect an uncounseled pretrial identification has in "crystalliz[ing] the witnesses' identification of the defendant for future reference." *Id.*, at 240. The

The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

The Court of Appeals concluded, without analysis, that if an absence-of-bad-faith requirement were not imposed, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the Exclusionary Rule reduced too far." 700 F. 2d, at 1169, n. 5. We reject that view. A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. Cf. *United States* v. *Ceccolini*, 435 U. S. 268, 283 (1978):

> "[T]he concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct" (opinion concurring in judgment).

On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in

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Court noted as well that possible unfairness at the lineup "may be the sole means of attack upon the unequivocal courtroom identification," *ibid.*, and recognized the difficulty of determining whether an in-court identification was based on independent recollection unaided by the lineup identification, *id.*, at 240–241. By contrast, inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings.

any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 397 (1971). In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

Williams contends that because he did not waive his right to the assistance of counsel, the Court may not balance competing values in deciding whether the challenged evidence was properly admitted. He argues that, unlike the exclusionary rule in the Fourth Amendment context, the essential purpose of which is to deter police misconduct, the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the factfinding process. Williams contends that, when those interests are at stake, the societal costs of excluding evidence obtained from responses presumed involuntary are irrelevant in determining whether such evidence should be excluded. We disagree.

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. See *United States* v. *Ash*, 413 U. S. 300, 314 (1973); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 241 (1973). Here, however, Detective Leaming's conduct did nothing to impugn the reliability of the evidence in question—the body of the child and its condition as it was found, articles of clothing found on the body, and the autopsy. No one would seriously contend that the presence of counsel in the police car when Leaming appealed to Williams' decent human instincts would have had any bearing on the reliability of the body as evidence. Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice. To assure the fairness of trial proceedings, this Court has held that assistance of counsel must be available at pretrial confrontations where "the subsequent trial [cannot] cure a[n otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant." *United States* v. *Ash*, *supra*, at 315. Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

More than a half century ago, Judge, later Justice, Cardozo made his seminal observation that under the exclusionary rule "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). Prophetically, he went on to consider "how far-reaching in its effect upon society" the exclusionary rule would be when

> "[t]he pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon

> an offender for crimes the most flagitious." *Id.*, at 23, 150 N. E., at 588.

Some day, Cardozo speculated, some court might press the exclusionary rule to the outer limits of its logic—or beyond—and suppress evidence relating to the "body of a murdered" victim because of the means by which it was found. *Id.*, at 23–24, 150 N. E., at 588. Cardozo's prophecy was fulfilled in *Killough* v. *United States*, 114 U. S. App. D. C. 305, 309, 315 F. 2d 241, 245 (1962) (en banc). But when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.

C

The Court of Appeals did not find it necessary to consider whether the record fairly supported the finding that the volunteer search party would ultimately or inevitably have discovered the victim's body. However, three courts independently reviewing the evidence have found that the body of the child inevitably would have been found by the searchers. Williams challenges these findings, asserting that the record contains only the "*post hoc* rationalization" that the search efforts would have proceeded two and one-half miles into Polk County where Williams had led police to the body.

When that challenge was made at the suppression hearing preceding Williams' second trial, the prosecution offered the testimony of Agent Ruxlow of the Iowa Bureau of Criminal Investigation. Ruxlow had organized and directed some 200 volunteers who were searching for the child's body. Tr. of Hearings on Motion to Suppress in *State* v. *Williams*, No. CR 55805, p. 34 (May 31, 1977). The searchers were instructed "to check all the roads, the ditches, any culverts . . . . If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted." *Id.*, at 35. Ruxlow testified that he marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and assigned each team to search specific grid areas. *Id.*, at 34. Ruxlow also testified that, if the search had not been suspended because of Williams' promised cooperation, it would have continued into Polk County, using the same grid system. *Id.*, at 36, 39–40. Although he had previously marked off into grids only the highway maps of Poweshiek and Jasper Counties, Ruxlow had obtained a map of Polk County, which he said he would have marked off in the same manner had it been necessary for the search to continue. *Id.*, at 39.

The search had commenced at approximately 10 a. m. and moved westward through Poweshiek County into Jasper County. At approximately 3 p. m., after Williams had volunteered to cooperate with the police, Detective Leaming, who was in the police car with Williams, sent word to Ruxlow and the other Special Agent directing the search to meet him at the Grinnell truck stop and the search was suspended at that time. *Id.*, at 51–52. Ruxlow also stated that he was "under the impression that there was a possibility" that Williams would lead them to the child's body at that time. *Id.*, at 61. The search was not resumed once it was learned that Williams had led the police to the body, *id.*, at 57, which was found two and one-half miles from where the search had stopped in what would have been the easternmost grid to be searched in Polk County, *id.*, at 39. There was testimony that it would have taken an additional three to five hours to discover the body if the search had continued, *id.*, at 41; the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search.

On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found. The evidence asserted by Williams as newly discovered, *i. e.*, certain photographs of the body and deposition testimony of Agent Ruxlow made in connection with the federal habeas proceeding, does not demonstrate that the material facts were inadequately developed in the suppression hearing in state court or that Williams was denied a full, fair, and adequate opportunity to present all relevant facts at the suppression hearing.[6]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

JUSTICE WHITE, concurring.

I join fully in the opinion of the Court. I write separately only to point out that many of Justice Stevens' remarks are beside the point when it is recalled that *Brewer* v. *Williams*, 430 U. S. 387 (1977), was a 5–4 decision and that four Members of the Court, including myself, were of the view that Detective Leaming had done nothing wrong at all, let alone anything unconstitutional. Three of us observed: "To anyone not lost in the intricacies of the prophylactic rules of *Miranda* v. *Arizona*, the result in this case seems utterly senseless . . . ." *Id.*, at 438. It is thus an unjustified reflection on Detective Leaming to say that he "decide[d] to dispense with the requirements of law," *post*, this page, or that he decided "to take procedural shortcuts instead of complying with the law," *post*, at 457. He was no doubt acting as many competent police officers would have acted under similar circumstances and in light of the then-existing law. That five Justices later thought he was mistaken does not call for making him out to be a villain or for a lecture on deliberate police misconduct and its resulting costs to society.

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[6] Williams had presented to the District Court newly discovered evidence consisting of "previously overlooked photographs of the body at the site of its discovery and recent deposition testimony of the investigative officer in charge of the search [Ruxlow]." 528 F. Supp., at 671, n. 6. He contends that Ruxlow's testimony was no more than "*post hoc* rationalization" and challenges Ruxlow's credibility. However, the state trial court and Federal District Court that heard Ruxlow's testimony credited it. The District Court found that the newly discovered evidence "neither adds much to nor subtracts much from the suppression hearing evidence." *Ibid.*

[7] In view of our holding that the challenged evidence was admissible under the inevitable discovery exception to the exclusionary rule, we find it unnecessary to decide whether *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended to bar federal habeas corpus review of Williams' Sixth Amendment claim, and we express no view on that issue.

JUSTICE STEVENS, concurring in the judgment.

This litigation is exceptional for at least three reasons. The facts are unusually tragic; it involves an unusually clear violation of constitutional rights; and it graphically illustrates the societal costs that may be incurred when police officers decide to dispense with the requirements of law. Because the Court does not adequately discuss any of these aspects of the case, I am unable to join its opinion.

I

In holding that respondent's first conviction had been unconstitutionally obtained, Justice Stewart, writing for the Court, correctly observed:

> "The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." *Brewer* v. *Williams*, 430 U. S. 387, 406 (1977) *(Williams I)*.

There can be no denying that the character of the crime may have an impact on the decisional process. As the Court was required to hold, however, that does not permit any court to condone a violation of constitutional rights.[1] Today's decision is no more an ad hoc response to the pressures engendered by the special facts of the case than was *Williams I*. It was the majority in *Williams I* that recognized that "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." *Id.*, at 407, n. 12. It was the author of today's opinion of the Court who characterized this rule of law as a "remarkable" and "unlikely theory." *Id.*, at 416–417, n. 1 (BURGER, C. J., dissenting). The rule of law that the Court adopts today has an integrity of its own and is not merely the product of the hydraulic pressures associated with hard cases or strong words.

II

The constitutional violation that gave rise to the decision in *Williams I* is neither acknowledged nor fairly explained in the Court's opinion. Yet the propriety of admitting evidence relating to the victim's body can only be evaluated if that constitutional violation is properly identified.

Before he was taken into custody, Williams, as a recent escapee from a mental hospital who had just abducted and murdered a small child, posed a special threat to public safety. Acting on his lawyer's advice, Williams surrendered to the Davenport police. The lawyer notified the Des Moines police of Williams' imminent surrender, and police officials, in the presence of Detective Leaming, agreed that Williams would not be questioned while being brought back from Davenport. Williams was advised of this agreement by his attorney. After he was arraigned in Davenport, Williams conferred with another lawyer who was acting as local counsel. This lawyer reminded Williams that he would not be questioned. When Detective Leaming arrived in Davenport, local counsel stressed that the agreement was to be carried out and that Williams was not to be questioned. Detective Leaming then took custody of respondent, and denied counsel's request to ride to Des Moines in the police car with Williams. The "Christian burial speech" occurred during the ensuing trip.[2] As JUSTICE POWELL succinctly observed, this was a case "in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement." *Id.*, at 414, n. 2 (concurring opinion).

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[1] As I wrote at the time:

"Nothing we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent's escape from a state mental institution. The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us." 430 U. S., at 415 (concurring opinion).

The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the *ex parte* investigation and determination by the prosecutor.[3] *Williams I* grew out of a line of cases in which this Court made it clear that the adversarial process protected by the Sixth Amendment may not be undermined by the strategems of the police.

Spano v. *New York*, 360 U. S. 315 (1959), dealt with the confession of an uncounseled defendant after prolonged interrogation subsequent to his indictment for first-degree murder. Four Justices indicated that this questioning violated the Sixth Amendment, noting that to hold otherwise would totally undermine the adversarial process of proof:

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[2] These are the facts found in *Williams I*. See 430 U. S., at 390–393. As Professor Kamisar has demonstrated, there are a number of unexplained ambiguities in the record. Kamisar, Foreword: *Brewer v. Williams*—A Hard Look at a Discomfiting Record, 66 Geo. L. J. 209 (1977). Nevertheless, this account of the facts was the basis for *Williams I*, and neither party seeks reexamination of those findings.

[3] See, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668, 685–687 (1984); *United States* v. *Cronic*, 466 U. S. 648, 655–657 (1984); *Polk County* v. *Dodson*, 454 U. S. 312, 318 (1981); *Herring* v. *New York*, 422 U. S. 853, 862 (1975); *Anders* v. *California*, 386 U. S. 738, 743 (1967).

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station." *Id.*, at 327 (Stewart, J., concurring, joined by Douglas and BRENNAN, JJ.).

As Justice Douglas asked: "[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights." *Id.*, at 326 (Douglas, J., concurring, joined by Black and BRENNAN, JJ.).

This view ripened into a holding in *Massiah* v. *United States*, 377 U. S. 201 (1964): "We hold that the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.*, at 206. *Williams I* held that Detective Leaming had violated "the clear rule of *Massiah*" by deliberately eliciting incriminating statements from respondent during the pendency of the adversarial process and outside of that process. See 430 U. S., at 399–401. The violation was aggravated by the fact that Detective Leaming had breached a promise to counsel, an act which can only undermine the role of counsel in the adversarial process.[4] The

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[4] "The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of

"Christian burial speech" was nothing less than an attempt to substitute an *ex parte*, inquisitorial process for the clash of adversaries commanded by the Constitution.[5] Thus the now-familiar plaint that "'[t]he criminal is to go free because the constable has blundered,'" *ante*, at 447 (quoting *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926)), is entirely beside the point. More pertinent is what THE CHIEF JUSTICE wrote for the Court on another occasion: "This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered,' rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." *United States* v. *Henry*, 447 U. S. 264, 274–275 (1980) (footnote and citation omitted).[6]

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the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer." 430 U. S., at 415 (STEVENS, J., concurring) (footnote omitted). See also *id.*, at 401, n. 8.

[5] "The whole point of *Massiah* is the prevention of the state from taking advantage of an uncounseled defendant once sixth amendment rights attach. The Christian burial speech was an attempt to take advantage of Williams. The attempt itself *is* what *Massiah* prohibits. The attempt itself violates the constitutional mandate that the system proceed, after some point, only in an accusatorial manner." Grano, *Rhode Island v. Innis:* A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am. Crim. L. Rev. 1, 35 (1979) (emphasis in original).

[6] See also 430 U. S., at 409 (MARSHALL, J., concurring). The theme of THE CHIEF JUSTICE's dissenting opinion in *Williams I* seems to permeate the opinion he has written for the Court today, even to the extent of again using the familiar hypothetical found in *People* v. *Defore*. Compare the discussion of Judge Cardozo's "grim prophecy," 430 U. S., at 416–417 (dissenting opinion), with *ante*, at 447–448. See also *Stone* v. *Powell*, 428 U. S. 465, 502 (1976) (BURGER, C. J., concurring); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 413, and n. 3 (1971) (BURGER, C. J., dissenting); *Killough* v. *United States*, 114 U. S. App. D. C. 305, 323, 315 F. 2d 241, 259 (1962) (en banc) (Burger, J., dissenting).

III

Once the constitutional violation is properly identified, the answers to the questions presented in this case follow readily. Admission of the victim's body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of Detective Leaming is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the Sixth Amendment envisions. See *United States* v. *Morrison*, 449 U. S. 361 (1981); *Weatherford* v. *Bursey*, 429 U. S. 545 (1977); *United States* v. *Wade*, 388 U. S. 218, 240–243 (1967). Generalizations about the exclusionary rule employed by the majority, see *ante*, at 443–448, simply do not address the primary question in the case.

The majority is correct to insist that any rule of exclusion not provide the authorities with an incentive to commit violations of the Constitution. *Ante*, at 445–446. If the inevitable discovery rule provided such an incentive by permitting the prosecution to avoid the uncertainties inherent in its search for evidence, it would undermine the constitutional guarantee itself, and therefore be inconsistent with the deterrent purposes of the exclusionary rule.[7] But when the burden of proof on the inevitable discovery question is placed on the prosecution, *ante*, at 444, *it* must bear the risk of error in the determination made necessary by its constitutional violation. The uncertainty as to whether the body would have been discovered can be resolved in its favor here only because, as the Court explains *ante*, at 448–450, petitioner adduced evidence demonstrating that at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body. This is not a case in which the prosecution can escape responsibility for a constitutional violation through speculation; to the extent uncertainty was created by the constitutional violation the prosecution was required to resolve that uncertainty through proof.[8] Even if Detective Leaming acted in bad faith in the sense that he deliberately violated the Constitution in order to avoid the possibility that the body would not be discovered, the prosecution ultimately does not avoid that risk; its burden of proof forces it to assume the risk. The need to adduce proof sufficient to discharge its burden, and the difficulty in predicting whether such proof will be available or sufficient, means that the inevitable discovery rule does not permit state officials to avoid the uncertainty they would have faced but for the constitutional violation.

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[7] See *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967); *Gilbert* v. *California*, 388 U. S. 263, 272–273 (1967). See also *Moore* v. *Illinois*, 434 U. S. 220 (1977). See generally, *e. g.*, *Stone* v. *Powell*, 428 U. S., at 484; *United States* v. *Janis*, 428 U. S. 433, 443, n. 12 (1976); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974); *Terry* v. *Ohio*, 392 U. S. 1, 29 (1968); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 413 (1966); *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961); *Elkins* v. *United States*, 364 U. S. 206, 217 (1960).

The majority refers to the "societal cost" of excluding probative evidence. *Ante*, at 445. In my view, the more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law. What is the consequence of the shortcut that Detective Leaming took when he decided to question Williams in this case and not to wait an hour or so until he arrived in

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[8] I agree with the majority's holding that the prosecution must prove that the evidence would have been inevitably discovered by a preponderance of the evidence rather than by clear and convincing evidence, *ante*, at 444–445, n. 5. An inevitable discovery finding is based on objective evidence concerning the scope of the ongoing investigation which can be objectively verified or impeached. Hence an extraordinary burden of proof is not needed in order to preserve the defendant's ability to subject the prosecution's case to the meaningful adversarial testing required by the Sixth Amendment. See *United States* v. *Cronic*, 466 U. S., at 655–657.

Des Moines?[9] The answer is years and years of unnecessary but costly litigation. Instead of having a 1969 conviction affirmed in routine fashion, the case is still alive 15 years later. Thanks to Detective Leaming, the State of Iowa has expended vast sums of money and countless hours of professional labor in his defense. That expenditure surely provides an adequate deterrent to similar violations; the responsibility for that expenditure lies not with the Constitution, but rather with the constable.

Accordingly, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Brewer* v. *Williams*, 430 U. S. 387 (1977), we held that the respondent's state conviction for first-degree murder had to be set aside because it was based in part on statements obtained from the respondent in violation of his right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. At the same time, we noted that, "[w]hile neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event." *Id.*, at 407, n. 12.

To the extent that today's decision adopts this "inevitable discovery" exception to the exclusionary rule, it simply acknowledges a doctrine that is akin to the "independent source" exception first recognized by the Court in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920). See *United States* v. *Wade*, 388 U. S. 218, 242 (1967);

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[9] In this connection, it is worth noting, as JUSTICE MARSHALL did in *Williams I*, that in light of the assistance that respondent's attorney had provided to the Des Moines police, it seems apparent that the lawyer intended to learn the location of the body from his client and then reveal it to the police. See 430 U. S., at 407–408 (concurring opinion). Thus, the need for a shortcut was practically nonexistent.

Wong Sun v. *United States*, 371 U. S. 471, 487 (1963). In particular, the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred. As has every Federal Court of Appeals previously addressing this issue, see *ante*, at 440–441, n. 2, I agree that in these circumstances the "inevitable discovery" exception to the exclusionary rule is consistent with the requirements of the Constitution.

In its zealous efforts to emasculate the exclusionary rule, however, the Court loses sight of the crucial difference between the "inevitable discovery" doctrine and the "independent source" exception from which it is derived. When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The "inevitable discovery" exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

In my view, this distinction should require that the government satisfy a heightened burden of proof before it is allowed to use such evidence. The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue. See *Wade*, *supra*, at 240. Increasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted. Cf. *Addington* v. *Texas*, 441 U. S. 418, 427 (1979); *Santosky* v. *Kramer*, 455 U. S. 745, 764 (1982) ("Raising the standard of proof would have both practical and symbolic consequences"). Because the lower courts did not impose such a requirement, I would remand this case for application of this heightened burden of proof by the lower courts in the first instance. I am therefore unable to join either the Court's opinion or its judgment.

MICHIGAN CANNERS & FREEZERS ASSOCIATION, INC., ET AL. *v.* AGRICULTURAL MARKETING AND BARGAINING BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN

No. 82-1577. Argued March 19, 1984—Decided June 11, 1984

The federal Agricultural Fair Practices Act of 1967 (AFPA) was enacted to enable individual farmers and other producers of agricultural commodities to join together voluntarily in cooperative associations in order to protect their marketing and bargaining position as against large and powerful agricultural processors. The AFPA makes it unlawful for "handlers"—defined to include both processors and producers' associations—to coerce any producer "in the exercise of his right to join . . . or to refrain from joining" a producers' association, 7 U. S. C. § 2303(a), or to coerce any producer to enter into or terminate a marketing contract with a producers' association or a contract with a handler, § 2303(c). The Michigan Agricultural Marketing and Bargaining Act (Michigan Act) includes the same prohibitions as the AFPA, but goes beyond it by establishing a state-administered system by which producers' associations are organized and certified as exclusive bargaining agents for all producers of a particular commodity. Under this system, if an association's membership constitutes more than 50% of the producers of a particular commodity and its members' production accounts for more than 50% of the commodity's total production, the association may be accredited as the exclusive bargaining agent for all producers of that commodity. Upon accreditation of the association, all producers of the commodity, regardless of whether they have chosen to become members of the association, must pay a service fee to the association and must abide by the contracts the association negotiates with processors. The Michigan Agricultural Cooperative Marketing Association (MACMA), a producers' association accredited under the Michigan Act, is the sole sales and bargaining representative for asparagus producers in the State. After the MACMA had negotiated contracts on behalf of Michigan asparagus growers to sell the asparagus crop for a certain year, appellant asparagus growers and association of asparagus processors, sued MACMA in state court seeking a declaratory judgment that the provisions of the Michigan Act requiring service fees and mandatory adherence to an association-negotiated contract are pre-empted by the AFPA. The Michigan Supreme Court rejected appellants' claim, holding that the

AFPA prohibited only processor misconduct, whereas the challenged provisions of the Michigan Act regulated producers' activities.

Held: The challenged provisions of the Michigan Act are pre-empted by the AFPA. Pp. 469–478.

(a) This is a case where the basis for pre-emption is that Congress, while not displacing state regulation entirely, has pre-empted state law to the extent that it conflicts with federal law and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67. Pp. 469–470.

(b) The AFPA's theme of voluntariness is carried through to the provisions defining the prohibited practices. By defining the term "handler" to include producers' associations as well as processors, the AFPA prohibits interference by the former to the same extent that it prohibits interference by the latter. Just as the AFPA forbids processors to interfere in a producer's decision to become or remain affiliated with an association, it also forbids a producers' association to interfere in that decision by coercing producers to belong to, or participate in a marketing contract with, the association. Pp. 470–471.

(c) Congress' intent to shield producers from coercion by both processors and producers' associations is confirmed by the AFPA's legislative history, which reveals that the question of the producer's free choice was a central focus of congressional attention during passage of the Act. Despite the fact that the Michigan Act and the AFPA share the goal of augmenting the producer's bargaining power, the Michigan Act conflicts with the AFPA by establishing "accredited" associations that wield the power to coerce producers to sell their products according to terms established by the association and to force producers to pay a service fee for the privilege. Pp. 471–477.

(d) The Michigan Act empowers producers' associations to do precisely what the AFPA forbids them to do. In effect, an association accredited under the Michigan Act may coerce a producer to enter into a marketing contract with a producers' association—a clear violation of § 2303(c). In addition, although the Michigan Act does not compel a producer to join an association, it binds him to the association's marketing contracts, forces him to pay fees to the association, and precludes him from marketing his goods himself, and thus, in practical effect, imposes on the producer the same incidents of association membership with which Congress was concerned in enacting § 2303(a). Pp. 477–478.

416 Mich. 706, 332 N. W. 2d 134, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Joseph G. Scoville argued the cause for appellants. With him on the briefs were *Ernest M. Sharpe* and *Jon D. Botsford.*

John H. Garvey argued the cause for the United States as *amicus curiae* urging reversal. With him on brief were *Solicitor General Lee* and *Deputy Solicitor General Geller.*

James A. White argued the cause for appellees and filed a brief for appellee Michigan Agricultural Cooperative Marketing Association, Inc. With him on the brief were *Theodore W. Swift* and *Michael J. Schmedlen. Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, and *Charles D. Hackney, Henry J. Boynton,* and *Michael J. Moquin,* Assistant Attorneys General, filed a brief for appellee Agricultural Marketing and Bargaining Board.*

JUSTICE BRENNAN delivered the opinion of the Court.

A perceived need to help the American farmer in his economic relations with large and powerful agricultural processors has moved Congress and various States to enact laws designed to bolster the farmer's bargaining power when bringing his goods to market. This case involves two such laws: the federal Agricultural Fair Practices Act of 1967 and the State of Michigan's Agricultural Marketing and Bargaining Act (Michigan Act). The question presented is whether certain provisions of the Michigan Act, which accord agricultural cooperative associations exclusive bargaining authority for the sale of agricultural products, are pre-empted by the federal Act. The Supreme Court of Michigan held that the Michigan Act is not pre-empted. 416

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*Briefs of *amici curiae* urging reversal were filed for the American Frozen Food Institute by *James F. Rill* and *Norman G. Knopf;* and for the National Food Processors Association by *H. Edward Dunkelberger, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the American Farm Bureau Federation by *John J. Rademacher* and *C. David Mayfield;* and for the California Tomato Grower's Association et al. by *Gerald D. Marcus.*

Mich. 706, 332 N. W. 2d 134 (1982). We noted probable jurisdiction, 464 U. S. 912 (1983), and now reverse.

I

A

The federal Agricultural Fair Practices Act (AFPA), 82 Stat. 93, 7 U. S. C. § 2301 *et seq.*, protects the right of farmers and other producers[1] of agricultural commodities to join cooperative associations through which to market their products.[2] Responding to "the growing concentration of power in the hands of fewer and larger buyers [of agricultural products]," S. Rep. No. 474, 90th Cong., 1st Sess., 2–3 (1967), Congress enacted the AFPA to rectify a perceived imbalance in bargaining position between producers and processors of such products. Although the Act's principal purpose is to protect individual producers from interference by processors when deciding whether to belong to a producers' association, the Act also protects the producer from coercion by associations of producers. The AFPA thus provides that it is unlawful for either a processor or a producers' association to engage in practices that interfere with a producer's freedom to choose whether to bring his products to market himself or to sell them through a producers' cooperative association. 7 U. S. C. § 2303. Specifically, § 2303(a) forbids "handlers"—

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[1] Title 7 U. S. C. § 2302(b) defines the term "producer" to mean "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower."

[2] Under § 1 of the Capper-Volstead Act, 7 U. S. C. § 291, and § 6 of the Clayton Act, 15 U. S. C. § 17, most activities of agricultural cooperatives were already exempt from the antitrust laws. Thus, producers already had a legal right to belong to such associations. The AFPA went further than the prior Acts by protecting the right against economic coercion.

The term "association of producers," also referred to herein as "producers' associations," is defined to mean "any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141(j) of title 12, or in section 291 of this title." 7 U. S. C. § 2302(c).

defined to include both processors and producers' associations[3]—to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers." Similarly, § 2303(c) forbids handlers to "coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler."[4]

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[3] The term "handler" generally refers to buyers and processors of agricultural products. As the AFPA evolved through the legislative process, however, and Congress decided to apply most of its prohibitions to producers' associations as well as to handlers, Congress expanded the definition of "handler" to include associations of producers. Thus 7 U. S. C. § 2302(a) provides:

"The term 'handler' means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or *on behalf of producers or associations of producers* with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph" (emphasis added).

In addition, 7 U. S. C. § 2302(d) provides that "the term 'person' includes individuals, partnerships, corporations, and *associations*" (emphasis added).

The term "processor" is used herein to refer to all "handlers" under the federal Act except producers' associations acting in their capacity as marketing representatives of producers.

[4] Section 2303 provides in full:

"It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

"(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

"(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

The Michigan Act, Mich. Comp. Laws § 290.701 *et seq.* (1984), also designed to facilitate collective action among producers, includes the same prohibitions as the federal Act. It goes beyond the federal statute, however, by extensively regulating the activities of producers' associations. Most importantly, the Michigan Act establishes a state-administered system by which producers' associations are organized and certified as exclusive bargaining agents for all producers of a particular commodity. §§ 290.703, 290.707. Under Michigan's system, if an association's membership constitutes more than 50% of the producers of a particular commodity, and its members' production accounts for more than 50% of the commodity's total production, the association may apply to the state Agricultural Marketing and Bargaining Board for accreditation as the exclusive bargaining agent for all producers of that particular commodity. § 290.707(c).[5] When the

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"(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

"(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

"(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

"(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter."

[5] Section 290.707 provides in pertinent part:

"An association shall be accredited upon determination by the board that the association meets all of the following:

. . . . .

"(c) The association has marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit. The board may determine the quantity produced by the bargaining unit using information on production in prior marketing periods, current market information, and projections on production during the current market periods. The board shall exclude from that quantity any quantity of the agricultural commodity contracted by pro-

Board accredits an association as the agent for the producers of a particular commodity, all producers of that commodity, regardless of whether they have chosen to become members

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ducers with producer owned and controlled processing cooperatives and any quantity produced by handlers. An association whose main purpose is bargaining but which processes a surplus into a form which is not the subject of bargaining is not a processing cooperative. The contracts with members shall specify the agricultural commodity and that the members have appointed the association as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity and obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association."

The Michigan Act also provides a mechanism whereby producers of various commodities are divided into "bargaining units" so that, once an association is accredited, it represents essentially 100% of the production of the commodity produced by its members. Thus § 290.706 provides:

"(1) The board shall determine whether a proposed bargaining unit is appropriate. This determination shall be made upon the petition of an association representing not less than 10% of the producers of the commodity eligible for membership in the proposed bargaining unit as defined by the association. An association with an overlapping definition of bargaining unit may, upon the presentation of a petition by not less than 10% of the producers eligible for membership in the overlapping bargaining unit, contest the proposed bargaining unit. . . .

"(2) In making its determination, the board shall define as appropriate the largest bargaining unit in terms of the quantity of the agricultural commodity produced, the definition of the agricultural commodity, geographic area covered and number of producers included as is consistent with the following criteria:

"(a) The community of interest of the producers included;

"(b) The potential serious conflicts of interests among members of the proposed unit;

"(c) The effect of exclusions on the capacity of the association to effectively bargain for the bargaining unit as defined;

"(d) The kinds, types and subtypes of products to be classed together as agricultural commodity for which the bargaining unit is proposed;

"(e) Whether the producers eligible for membership in the proposed bargaining unit meet the definition of "producer" for the agricultural commodity involved;

"(f) The wishes of the producers;

"(g) The pattern of past marketing of the commodity."

of the association, must pay a service fee to the association and must abide by the terms of the contracts the association negotiates with processors. §§290.710(1), 290.713(1).[6] Thus, the Michigan Act creates an "agency shop" arrangement among agricultural producers whenever there is majority support for such an arrangement among the producers of a particular commodity.

B

The Michigan Agricultural Cooperative Marketing Association, Inc. (MACMA), a producers' association accredited under the Michigan Act, is the sole sales and bargaining representative for asparagus producers in the State.[7] In 1974, as permitted by the Michigan Act, MACMA negotiated contracts on behalf of Michigan asparagus growers to sell the 1974 asparagus crop. In response, appellants Dukesherer Farms and Ferris Pierson, asparagus growers that would be bound by the contract, along with the Michigan Canners & Freezers Association, Inc., an association of asparagus processors,[8] sued MACMA in state court seeking a declaratory judgment that those provisions of the Michigan Act requiring service fees and mandatory adherence to an association-negotiated contract are pre-empted by the AFPA. The Supreme Court of Michigan rejected appellants' claim, holding that the Michigan Act operated in an area that the federal

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[6] Although the Michigan Act does not explicitly prohibit a producer represented by an accredited association from negotiating directly with a processor, it does prohibit the processor from negotiating with such a producer. §290.704(1)(h). The Michigan Act thus effectively eliminates direct dealing between a producer that is represented by an accredited association and a processor.

[7] The bargaining unit for which MACMA is accredited includes all Michigan farmers who produced a certain minimum quantity of asparagus during a defined marketing period.

[8] The Michigan Canners & Freezers Association, Inc., is an association of fruit and vegetable processors whose members process asparagus. Dukesherer Farms, Inc. is a corporation engaged in asparagus farming. And Ferris Pierson is an individual engaged in asparagus farming.

Act did not regulate. 416 Mich. 706, 332 N. W. 2d 134 (1976). Specifically, the Michigan court held that the federal Act prohibited only processor misconduct, whereas the challenged portions of the Michigan Act regulated producers' activities. We disagree.

II

Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. *E. g., Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95–96 (1983). Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. *E. g., Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Fidelity Federal Savings & Loan Assn., supra*, at 153.

It is the last basis of pre-emption that applies in this case. The AFPA contains no pre-emptive language; nor does it reflect a congressional intent to occupy the entire field of agricultural-product marketing. Indeed, the Act states that it "shall not be construed to change or modify existing State law." 7 U. S. C. §2305(d).[9] And, as this Court has recognized, "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc., supra,* at 144.

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[9] Appellee MACMA argues that this provision eliminates the pre-emptive effect the AFPA might otherwise have on the Michigan Act, despite the fact that the Michigan Act was enacted after the enactment of the

Appellants contend that the service-fee and mandatory-representation provisions of the Michigan Act frustrate the purpose and objective of the AFPA by imposing on unwilling producers an exclusive bargaining arrangement with associations. In their view, although Congress' chief interest in enacting the AFPA was to facilitate the growth of agricultural cooperative associations, an equally important congressional objective was to preserve the free choice of producers to join associations or to remain independent. The Michigan Act, appellants contend, deprives producers of that choice and allows associations, in effect, to coerce producers into association affiliation.[10]

A

We turn first to the wording of the AFPA. The Act begins with a finding that "the marketing and bargaining position of individual farmers will be adversely affected unless

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AFPA. Brief for Appellee MACMA 8–14. MACMA contends that at the time of the passage of the AFPA, California's Agricultural Prorate Act, upheld by this Court in *Parker* v. *Brown,* 317 U. S. 341 (1943), contained provisions "similar" to the provisions of the Michigan Act. Even if we were to accept MACMA's interpretation of § 2305(d), however, this argument is unpersuasive. The California Prorate Act bears no relevant similarity to the Michigan Act. The California Act provides for the orderly marketing of certain commodities by imposing marketing plans that restrict the quantity of a commodity that farmers may produce, regulate the flow of commodities to market, and establish grade and quality requirements. The basic goal of the California Act, as identified in *Parker* v. *Brown,* is to minimize the adverse effects of a market surplus. 317 U. S., at 355.

[10] Appellants argue that the AFPA accords processors the right to deal with producers individually and that the Michigan Act deprives processors of that right. This conflict, they contend, provides an additional basis upon which to decide that the Michigan Act is pre-empted. In light of our disposition of appellants' primary claim, however, we need not address that question.

they are free to join together *voluntarily* in cooperative organizations as authorized by law." § 2301 (emphasis added). More significantly, however, the theme of voluntariness is carried through to the provisions of the Act that define those practices that are prohibited. Thus, in addition to forbidding various practices that could discourage producers from joining associations, the Act explicitly makes unlawful the coercion of a producer "in the exercise of his right . . . *to refrain from joining or belonging* to an association of producers," and the coercion of a producer to "*enter into [or] maintain* . . . a membership agreement or marketing contract with an association of producers." §§ 2303(a) and (c) (emphasis added). Moreover, by defining the term "handler" to include producers' associations as well as processors of agricultural products, see *supra*, at 464–465, the Act prohibits interference by the former to the same extent that it prohibits interference by the latter. In short, just as the Act forbids processors to interfere in a producer's decision to become or remain affiliated with an association, it also forbids an association of producers to interfere in that decision by coercing producers to belong to, or participate in a marketing contract with, the association.

B

Congress' intent to shield producers from coercion by both processors and producers' associations is confirmed by the legislative history of the AFPA, which reveals that the question of the producer's free choice was a central focus of congressional attention during the passage of the Act. Although the AFPA began as a bill aimed solely at the threat of processor coercion, its orientation shifted as it progressed through Congress to one of sheltering the producer from coercion in either direction.

The bill originally introduced in the Senate, S. 109, 89th Cong., 1st Sess. (1965), did not explicitly protect the producer's right to remain independent from an association and for that reason provoked considerable criticism in the hearings that followed. Critics of the bill offered several reasons for prohibiting association coercion to the same extent as processor coercion. First, some producers stated that they preferred to remain independent because they believed they could earn more money if they marketed their products themselves.[11] Second, processors testified that unless associations were also prohibited from pressuring producers, there would be a serious risk that the associations would attain a bargaining position of monopoly proportion, to the detriment of not only the processor, but the consumer as well.[12] Third, witnesses testified that a prohibition on interference by producers' associations would promote competition on the merits among associations seeking membership.[13] Fourth, many handlers testified that they would be disadvantaged in the quality of the product they could buy as well as the price they would have to pay if producers' associations were permitted substantially to diminish the ranks of the independent producer.[14] Finally, witnesses testified that the producer's right to remain independent of an association was simply "a basic American right" deserving of protection.[15]

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[11] See, *e. g.*, Agricultural Producers Marketing Act: Hearings on S. 109 before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess., 144 (statement of Earl W. Kintner, National Tax Equality Association), 173–183 (statement of Paul L. Phillips) (1967) (hereinafter cited as 1967 Senate Hearings).

[12] See, *e. g.*, Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 before the Subcommittee of the Senate Committee on Agriculture and Forestry, 89th Cong., 2d Sess., 135 (1966) (statement of A. Starke Taylor Jr., Independent Cotton Industries Association) (hereinafter cited as 1966 Senate Hearings); 1967 Senate Hearings, at 110, 113–114 (statement of W. W. Holding III, American Cotton Shippers Association), 151 (statement of Earl W. Kintner, National Tax Equality Association), 196 (statement of Irving Isaacson, Maine Poultry Associates).

[13] See, *e. g.*, 1966 Senate Hearings, at 187 (statement of Harry L. Graham, National Grange).

[14] See, *e. g.*, 1967 Senate Hearings, at 69 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 91–92 (statement of G. Ted Cameron, National Broiler Council).

[15] 1967 Senate Hearings, at 10–11 (statement of Sen. Williams). See, *e. g.*, 1966 Senate Hearings, at 146 (statement of Donald G. Smith, Texas

In response to these concerns, the Senate passed an amended bill that prohibited coercion by both processors and associations, thereby protecting the producer's right to remain independent. The new bill opened with a legislative finding that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *or not join together* in cooperative organizations as authorized by law." 113 Cong. Rec. 21410 (1967) (emphasis added). The bill went on to provide:

> "*It shall be unlawful for any* handler or *association of producers* knowingly to engage . . . in the following practices:
>
> "(a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining or belonging to an association of producers* . . . ; or
>
> . . . . .
>
> "(c) To coerce or intimidate any producer or other person *to enter into [or] maintain* . . . a membership agreement or

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Independent Ginners Association), 196–197 (statement of Edward Dunkelberger, National Canners Association).

In addition, much of the testimony focused on the case of vertically integrated producers' associations that process their members' products. As several witnesses explained, because such associations compete in the processing market, the one-sided orientation of the bill provided these associations with an unfair competitive advantage over other processors. Indeed, many of these processors feared that the bill would, for that reason, drive them entirely out of business. See, *e. g.*, *id.*, at 135 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association), 138–140 (statement of Paul L. Courtney, National Association of Wholesalers); 1967 Senate Hearings, at 122–123 (statement of Herman Eubank, Texas Independent Ginners Association). The Michigan Act, however, effectively excludes vertically integrated associations from the accreditation process. In calculating the representational strength of an association seeking accreditation, the Michigan Act provides that "[t]he board shall exclude from [the total quantity of a commodity produced] any quantity of the agricultural commodity contracted by producers with producer owned and controlled processing cooperatives and any quantity produced by handlers." § 290.707(c). See n. 5, *supra*.

marketing contract with an association of producers or a contract with a handler . . . ." *Ibid.* (emphasis added).[16]

The Senate Report explaining these provisions of the bill stated:

> "The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction." S. Rep. No. 474, 90th Cong., 1st Sess., 5 (1967).

Similarly, when Senator Aiken introduced the bill on the floor of the Senate, he stated that the bill "is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association." 113 Cong. Rec. 21411 (1967).

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[16] § 4. Section 4(d), which addresses the provision of "inducements and rewards" to producers, applies only to those seeking to have a producer refuse or cease to belong to an association, an approach that was ultimately adopted in the AFPA. See 7 U. S. C. § 2303(d). The Senate Report explained that "[t]he association of producers should not be prohibited from offering inducements to producers to belong to an association, since it is quite proper for an association to pursue vigorously the voluntary organization of farmers in its attempt to secure a better bargaining position for farmers." S. Rep. No. 474, 90th Cong., 1st Sess., 6 (1967).

The Senate bill was next referred to the House Committee on Agriculture, *ibid.*, which heard testimony from producers' associations opposed to their inclusion in the prohibited-practices section of the bill.[17] The Committee rejected their plea, however, and declined to adopt a proposed amendment to the bill that would have limited its application to processors. H. R. Rep. No. 824, 90th Cong., 1st Sess., 4–5 (1967). Ultimately, the House deleted the explicit reference to associations of producers from the prohibited-practices section of the bill, 114 Cong. Rec. 7449 (1968), and it amended the legislative findings and declaration of policy to read: "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *voluntarily* in cooperative organizations as authorized by law." *Id.*, at 7469 (emphasis added).[18] In so doing, however, the House indicated that it did not intend to alter the substance of the bill. Representative Sisk explained:

> "Since the bill already makes clear that associations of producers are not excluded from the term 'handler,' the phrase ['association of producers' in the prohibited-practices section] is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult." *Id.*, at 7464.

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[17] Agricultural Fair Trade Practices: Hearings on S. 109 before the House Committee on Agriculture, 90th Cong,. 1st Sess., 66–67 (statement of Harry L. Graham, National Grange), 79 (statement of Tony T. Dechant, National Farmers Union), 89–90 (statement of Robert N. Hampton, National Council of Farmer Cooperatives), 109–110 (statement of Ralph B. Bunje, California Canning Peach Association) (1967).

[18] The Senate bill had stated that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *or not join together* in cooperative organizations as authorized by law." 113 Cong. Rec. 21410 (1967) (emphasis added).

Similarly, in reference to the proposed amendment, Representative Latta stated that "I want the record to clearly show that our farmers under the present language of this bill . . . have the right not to join these associations if they so choose." *Id.*, at 7449. In response to Representative Latta, Representative Poage, Chairman of the House Committee on Agriculture, stated:

> "It was clearly the opinion of the entire committee that there was not any intention or desire to give anybody the right to discriminate against anybody else because of his failure to join any of these associations.
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> . . . . .
>
> "I cannot see that the amendments do anything more than to make the matter read a little differently and a little more satisfactorily, to certain groups, without changing in one iota, so far as I can see, the legal effect of the legislation.
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> . . . . .
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> "I do not think taking out the words in numerous places—'associations of producers'—will in anywise change the legal effect." *Id*, at 7449–7450.

Finally, highlighting its intent to prohibit coerced affiliation with associations, the House amended the definition of the term "handler" to include any association "contracting or negotiating contracts or other arrangements, written or oral, with *or on behalf of* producers or associations of producers." *Id.*, at 7465, 7469 (emphasis added).[19]

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[19] Indeed, throughout the legislative debate on S. 109, an interest in protecting the producer from coercion by either processors or producers was frequently expressed. For example, Representative Poage, Chairman of the House Committee on Agriculture, stated:

"In the House we felt it could be just as offensive to have discrimination against producers because of their lack of membership as to have discrimination against them because of their membership. It was basically that we wanted to make this bill apply in both directions—to make of it a two-way street—to make of it a protector of the right of the producer to

The Senate agreed to the House amendments without debate. *Id.*, at 8419. Hence, in passing S. 109, both the House and the Senate unequivocally expressed an intent to prohibit producers' associations from coercing a producer to agree to membership or any other agency relationship that would impinge on the producer's independence. It would appear, therefore, that despite the fact that the Michigan Act and the AFPA share the goal of augmenting the producer's bargaining power, the Michigan Act nonetheless conflicts with the AFPA by establishing "accredited" associations that wield the power to coerce producers to sell their products according to terms established by the association and to force producers to pay a service fee for the privilege.

C

The Michigan Supreme Court held that "[w]hile § 2303 makes it unlawful for a handler to coerce a producer to 'join or belong to' an association, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit." 416 Mich., at 719, 332 N. W. 2d, at 139. The Michigan Act, however, empowers producers' associations to do precisely what the federal Act

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determine for himself whether he cared to or did not care to become a member of a cooperative.

". . . We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative." 114 Cong. Rec. 7451 (1968).

Similarly, Representative May stated:

"There was no one on the committee, either in testimony or in our discussion, that in any way wanted to confuse anyone about the farmer's right not to join an organization when he did not wish to do so. Actually that is spelled out in the prohibited practices . . . of the bill . . . when we say: To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers." *Id.*, at 7450.

And Representative Latta stated that "the farmers of this Nation will still have the right . . . to say to an association, 'I do not want to join your association and you cannot force me into it.'" *Ibid.*

forbids them to do. Once an association reaches a certain size and receives its accreditation, it is authorized to bind nonmembers, without their consent, to the marketing contracts into which it enters with processors. In effect, therefore, an accredited association operating under the Michigan Act may coerce a producer to "enter into [or] maintain . . . a marketing contract with an association of producers or a contract with a handler"—a clear violation of § 2303(c).[20] In addition, although the Michigan Act does not compel a producer to join an association, it binds him to the association's marketing contracts, forces him to pay fees to the association, and precludes him from marketing his goods himself. See n. 6, *supra*. In practical effect, therefore, the Michigan Act imposes on the producer the same incidents of association membership with which Congress was concerned in enacting § 2303(a).

In conclusion, because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S., at 67.[21] To that extent, therefore, the Michigan Act is pre-empted by the AFPA, and the judgment of the Supreme Court of Michigan is reversed.

It is so ordered.

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[20] Appellees attempt to draw an analogy between this case and cases covered by the "state-action exemption" to the federal antitrust laws. Brief for Appellee Agricultural Marketing and Bargaining Board 26–36; Brief for Appellee MACMA 22–31. The state-action exemption, however, is based on an interpretation of the antitrust laws and therefore has no direct application here. See, *e. g.*, *Parker* v. *Brown*, 317 U. S. 341 (1943). Moreover, the Michigan Act does not provide for the type of active state involvement in the market that the state-action exemption would require even if it were applicable.

[21] Because the Michigan Act is cast in permissive rather than mandatory terms—an association *may*, but need not, act as exclusive bargaining representative—this is not a case in which it is impossible for an individual to comply with both state and federal law. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963).

CALIFORNIA *v.* TROMBETTA ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 83–305. Argued April 18, 1984—Decided June 11, 1984

When stopped in unrelated incidents on suspicion of drunken driving on California highways, each respondent submitted to a Intoxilyzer (breath-analysis) test and registered a blood-alcohol concentration high enough to be presumed to be intoxicated under California law. Although it was technically feasible to preserve samples of respondents' breath, the arresting officers, as was their ordinary practice, did not do so. Respondents were then all charged with driving while intoxicated. Prior to trial, the Municipal Court denied each respondent's motion to suppress the Intoxilyzer test results on the ground that the arresting officers had failed to preserve samples of respondents' breath that the respondents claim would have enabled them to impeach the incriminating test results. Ultimately, in consolidated proceedings, the California Court of Appeal ruled in respondents' favor, concluding that due process demanded that the arresting officers preserve the breath samples.

Held: The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial, and thus here the State's failure to preserve breath samples for respondents did not constitute a violation of the Federal Constitution. Pp. 485–491.

(a) To the extent that respondents' breath samples came into the California authorities' possession, it was for the limited purpose of providing raw data to the Intoxilyzer. The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. The authorities did not destroy the breath samples in a calculated effort to circumvent the due process requirement of *Brady* v. *Maryland*, 373 U. S. 83, and its progeny that the State disclose to criminal defendants material evidence in its possession, but in failing to preserve the samples the authorities acted in good faith and in accord with their normal practice. Pp. 485–488.

(b) More importantly, California's policy of not preserving breath samples is without constitutional defect. The constitutional duty of the States to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense. The evidence must possess an exculpatory value that was apparent before it was destroyed, and must also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions was met on the facts of this case. Pp. 488–490.

142 Cal. App. 3d 138, 190 Cal. Rptr. 319, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, *post*, p. 491.

Charles R. B. Kirk, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van De Kamp*, Attorney General, *William D. Stein*, Assistant Attorney General, and *Gloria F. De Hart*, Deputy Attorney General.

John F. DeMeo argued the cause for respondents. With him on the brief were *Thomas R. Kenney*, *J. Frederick Haley*, and *John A. Pettis*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. *United States* v. *Agurs*, 427 U. S. 97 (1976); *Brady* v.

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, *James B. Early*, Special Assistant Attorney General, and *Thomas L. Fabel*, Deputy Attorney General, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Edwin Lloyd Tittman*, Attorney General of Mississippi, and *Mike Greely*, Attorney General of Montana; for the Appellate Committee of the California District Attorney's Association by *John R. Vance, Jr.*; and for the National District Attorneys Association, Inc., et al. by *David Crump*, *Wayne W. Schmidt*, *James P. Manak*, and *Edwin L. Miller, Jr.*

George L. Schraer and *Lisa Short* filed a brief for the State Public Defender of California as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of North Carolina by *Rufus L. Edmisten*, Attorney General, and *Isaac T. Avery III*, Special Deputy Attorney General; for the County of Los Angeles by *Robert H. Philibosian*, *Harry B. Sondheim*, and *John W. Messer*; and for the California Public Defender's Association et al. by *Albert J. Menaster*, *William M. Thornbury*, and *Ephraim Margolin.*

Maryland, 373 U. S. 83 (1963). This case raises the question whether the Fourteenth Amendment also demands that the State preserve potentially exculpatory evidence on behalf of defendants. In particular, the question presented is whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions.

I

The Omicron Intoxilyzer (Intoxilyzer) is a device used in California to measure the concentration of alcohol in the blood of motorists suspected of driving while under the influence of intoxicating liquor.[1] The Intoxilyzer analyzes the suspect's breath. To operate the device, law enforcement officers follow these procedures:

> "Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then

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[1] Law enforcement agencies in California are obliged to use breath-analysis equipment that has been approved by the State's Department of Health. See 17 Cal. Admin. Code § 1221 (1976). The Department has approved a number of blood-alcohol testing devices employing a variety of technologies, see List of Instruments and Related Accessories Approved for Breath Alcohol Analysis (Dec. 20, 1979), reprinted in App. 238–247, of which the Omicron Intoxilyzer is the most popular model, see Brief for Petitioner 6, n. 6.

> checked for a reading of zero alcohol. The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant." 142 Cal. App. 3d 138, 141–142, 190 Cal. Rptr. 319, 321 (1983) (citations omitted).

In unrelated incidents in 1980 and 1981, each of the respondents in this case was stopped on suspicion of drunken driving on California highways. Each respondent submitted to an Intoxilyzer test.[2] Each respondent registered a blood-alcohol concentration substantially higher than 0.10 percent. Under California law at that time, drivers with higher than 0.10 percent blood-alcohol concentrations were presumed to be intoxicated. Cal. Veh. Code Ann. § 23126(a)(3) (West 1971) (amended 1981). Respondents were all charged with driving while intoxicated in violation of Cal. Veh. Code Ann. § 23102 (West 1971) (amended 1981).

Prior to trial in Municipal Court, each respondent filed a motion to suppress the Intoxilyzer test results on the ground that the arresting officers had failed to preserve samples of respondents' breath. Although preservation of breath samples is technically feasible,[3] California law enforcement officers do not ordinarily preserve breath samples, and made no effort to do so in these cases. Respondents each claimed that, had a breath sample been preserved, he would have been able to impeach the incriminating Intoxilyzer results. All of respondents' motions to suppress were denied. Respondents Ward and Berry then submitted their cases on the police records and were convicted. Ward and Berry subsequently petitioned the California Court of Appeal for writs of habeas corpus. Respondents Trombetta and Cox did not submit to trial. They sought direct appeal from the Municipal Court orders, and their appeals were eventually transferred to the Court of Appeal to be consolidated with the Ward and Berry petitions.[4]

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[2] Under California law, drunken driving suspects are given the choice of having their blood-alcohol concentraton determined by either a blood test, a urine test, or a breath test. Cal. Veh. Code Ann. § 13353 (West 1971 and Supp. 1984). Suspects who refuse to submit to any test are liable to have their driving licenses suspended. *Ibid.*

[3] The California Department of Health has approved a device, known as an Intoximeter Field Crimper-Indium Tube Encapsulation Kit (Kit), which officers can use to preserve breath samples. App. 247. To use the Kit, a suspect must breathe directly into an indium tube, which preserves samples in three separate chambers. See 142 Cal. App. 3d 138, 142, 190 Cal. Rptr. 319, 321 (1983). The breath trapped in each chamber can later be used to determine the suspect's blood-alcohol concentration through the use of a laboratory instrument known as a Gas Chromatograph Intoximeter, which has also been approved by the California Department of Health. App. 242–243. Because the suspect must breathe directly into the indium tube, the Kit cannot be used to preserve the same breath sample used in an Intoxilyzer test. See, *supra*, at 481–482. Other devices,

The California Court of Appeal ruled in favor of respondents. After implicitly accepting that breath samples would be useful to respondents' defenses, the court reviewed the available technologies and determined that the arresting officers had the capacity to preserve breath samples for respondents. 142 Cal. App. 3d, at 141–142, 190 Cal. Rptr., at 320–321. Relying heavily on the California Supreme Court's decision in *People* v. *Hitch*, 12 Cal. 3d 641, 527 P. 2d 361 (1974), the Court of Appeal concluded: "Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and

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similar in function to the Kit, can be attached to an Intoxilyzer and used to collect the air that the Intoxilyzer purges, see Brief for Respondents 18–19, but none of these devices has yet received approval from the California Department of Health, see Reply Brief for Petitioner 3–4.

[4] The California Court of Appeal expressed some doubt whether respondents Trombetta and Cox were entitled to appeal their suppression orders and ultimately ordered that their appeals be dismissed. 142 Cal. App. 3d, at 140, 143, 190 Cal. Rptr., at 320, 323. The court, however, ruled on the merits of their claims and thereby exercised jurisdiction over their appeals. *Id.*, at 144, 190 Cal. Rptr., at 323. As to Trombetta and Cox, the Court of Appeal decision was comparable to a judgment affirming a suppression order, which is reviewable in this Court under 28 U. S. C. § 1257(3). Cf., *e. g.*, *Michigan* v. *Clifford*, 464 U. S. 287 (1984).

systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant." 142 Cal. App. 3d, at 144, 190 Cal. Rptr., at 323.[5] The court granted respondents Ward and Berry new trials, and ordered that the Intoxilyzer results not be admitted as evidence against the other two respondents. The State unsuccessfully petitioned for certiorari in the California Supreme Court, and then petitioned for review in this Court. We granted certiorari, 464 U. S. 1037 (1984), and now reverse.

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[5] *People* v. *Hitch* involved another device used to measure blood-alcohol concentrations. With that device, a suspect's breath bubbles through a glass ampoule containing special chemicals that change colors depending on the amount of alcohol in the suspect's blood. 12 Cal. 3d, at 644, 527 P. 2d, at 363–364. In keeping with California procedures, law enforcement officials in *Hitch* discarded the ampoule after they had completed their testing, even though the ampoule might have been saved for retesting by the defendant. Relying on this Court's decisions in *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *Giglio* v. *United States*, 405 U. S. 150, 153–154 (1972), the California Supreme Court concluded that the Due Process Clause is implicated when a State intentionally destroys evidence that might have proved favorable to a criminal defendant. 12 Cal. 3d, at 645–650, 527 P. 2d, at 364–370. The *Hitch* decision was noteworthy in that it extrapolated from *Brady*'s disclosure requirement an additional constitutional duty on the part of prosecutors to preserve potentially exculpatory evidence. See Note, The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine, 75 Colum. L. Rev. 1355, 1364–1368 (1975); cf. *United States* v. *Bryant*, 142 U. S. App. D. C. 132, 141, 439 F. 2d 642, 651 (1971) (Wright, J.) (Government must make "'earnest efforts' to preserve crucial materials and to find them once a discovery request is made").

For a number of years, there was uncertainty whether the California courts would extend the *Hitch* decision to the Intoxilyzer. In *People* v. *Miller*, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975), a Court of Appeal panel refused to extend *Hitch* because the Intoxilyzer does not reduce breath samples to a preservable form comparable to the ampoules created with the device involved in *Hitch*. The Court of Appeal in *Trombetta* declined to follow *Miller*, and reasoned that as long as there were other methods of preserving specimens (such as the Indium Tube Kit, see n. 3, *supra*), the State was obliged to preserve a breath sample equivalent to the one used in the Intoxilyzer. 142 Cal. App. 3d, at 143–144, 190 Cal. Rptr., at 322–323.

II

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *Napue* v. *Illinois*, 360 U. S. 264, 269–272 (1959); see also *Mooney* v. *Holohan*, 294 U. S. 103 (1935). But criminal defendants are entitled to much more than protection against perjury. A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady* v. *Maryland*, 373 U. S., at 87. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States* v. *Agurs*, 427 U. S., at 112. The prosecution must also reveal the contents of plea agreements with key government witnesses, see *Giglio* v. *United States*, 405 U. S. 150 (1972), and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense, *Roviaro* v. *United States*, 353 U. S. 53 (1957).

Less clear from our access-to-evidence cases is the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession. On a few occasions, we have suggested that the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial. For instance, in *United States* v. *Marion*, 404 U. S. 307, 324 (1971), and in *United States* v. *Lovasco*, 431 U. S. 783, 795, n. 17 (1977), we intimated that a due process violation might occur if the Government delayed an indictment for so long that the defendant's ability to mount an effective defense was impaired. Similarly, in *United States* v. *Valenzuela-Bernal*, *supra*, we acknowledged that the Government could offend the Due Process Clause of the Fifth Amendment if, by deporting potential witnesses, it diminished a defendant's opportunity to put on an effective defense.[6] 458 U. S., at 873.

We have, however, never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Cf. *United States* v. *Valenzuela-Bernal*, *supra*, at 870. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing—as the California Court of Appeal did in this case—the State's most probative evidence.

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[6] In related cases arising under the Sixth and Fourteenth Amendments, we have recognized that criminal defendants are entitled to call witnesses on their own behalf and to cross-examine witnesses who have testified on the government's behalf. See *Davis* v. *Alaska*, 415 U. S. 308 (1974); *Washington* v. *Texas*, 388 U. S. 14 (1967).

One case in which we have discussed due process constraints on the Government's failure to preserve potentially exculpatory evidence is *Killian* v. *United States*, 368 U. S. 231 (1961). In *Killian*, the petitioner had been convicted of giving false testimony in violation of 18 U. S. C. § 1001. A key element of the Government's case was an investigatory report prepared by the Federal Bureau of Investigation. The Solicitor General conceded that, prior to petitioner's trial, the F. B. I. agents who prepared the investigatory report destroyed the preliminary notes they had made while interviewing witnesses. The petitioner argued that these notes would have been helpful to his defense and that the agents had violated the Due Process Clause by destroying this exculpatory evidence. While not denying that the notes might have contributed to the petitioner's defense, the Court ruled that their destruction did not rise to the level of constitutional violation:

> "If the agents' notes . . . were made only for the purpose of transferring the data thereon . . . , and if, having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right." *Id.*, at 242.

In many respects the instant case is reminiscent of *Killian* v. *United States*. To the extent that respondents' breath samples came into the possession of California authorities, it was for the limited purpose of providing raw data to the

Intoxilyzer.[7] The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. As the petitioner in *Killian* wanted the agents' notes in order to impeach their final reports, respondents here seek the breath samples in order to challenge incriminating tests results produced with the Intoxilyzer.

Given our precedents in this area, we cannot agree with the California Court of Appeal that the State's failure to retain breath samples for respondents constitutes a violation of the Federal Constitution. To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by *Brady* v. *Maryland* and its progeny. In failing to preserve breath samples for respondents, the officers here were acting "in good faith and in accord with their normal practice." *Killian* v. *United States*, *supra*, at 242. The record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence.

More importantly, California's policy of not preserving breath samples is without constitutional defect. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.[8]

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[7] We accept the California Court of Appeal's conclusion that the Intoxilyzer procedure brought respondents' breath samples into the possession of California officials. The capacity to preserve breath samples is equivalent to the actual possession of samples. See n. 5, *supra*.

[8] In our prosecutorial disclosure cases, we have imposed a similar requirement of materiality, *United States* v. *Agurs*, 427 U. S. 97 (1976), and have rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *Id.*, at 111; see also *Moore* v. *Illinois*, 408 U. S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

To meet this standard of constitutional materiality, see *United States* v. *Agurs*, 427 U. S., at 109–110, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case.

Although the preservation of breath samples might conceivably have contributed to respondents' defenses, a dispassionate review of the Intoxilyzer and the California testing procedures can only lead one to conclude that the chances are extremely low that preserved samples would have been exculpatory. The accuracy of the Intoxilyzer has been reviewed and certified by the California Department of Health.[9] To protect suspects against machine malfunctions, the Department has developed test procedures that include two independent measurements (which must be closely correlated for the results to be admissible) bracketed by blank runs designed to ensure that the machine is purged of alcohol traces from previous tests. See *supra*, at 481–482. In all but a tiny fraction of cases, preserved breath samples would simply confirm the Intoxilyzer's determination that the defendant had a high level of blood-alcohol concentration at the time of the test. Once the Intoxilyzer indicated that respondents were legally drunk, breath samples were much more likely to provide inculpatory than exculpatory evidence.[10]

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[9] The Intoxilyzer has also passed accuracy requirements established by the National Highway Traffic Safety Administration of the Department of Transportation. See 38 Fed. Reg. 30459 (1973); A. Flores, Results of the First Semi-Annual Qualification Testing of Devices to Measure Breath Alcohol 10 (Dept. of Transportation 1975).

[10] The materiality of breath samples is directly related to the reliability of the Intoxilyzer itself. The degree to which preserved samples are material depends on how reliable the Intoxilyzer is. This correlation suggests that a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were

Even if one were to assume that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence. Respondents and *amici* have identified only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. See Brief for Respondents 32–34; Brief for California Public Defender's Association et al. as *Amici Curiae* 25–40. Respondents were perfectly capable of raising these issues without resort to preserved breath samples. To protect against faulty calibration, California gives drunken driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations. See *supra*, at 481–482. Respondents could have utilized these data to impeach the machine's reliability. As to improper measurements, the parties have identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting. For defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves. Finally, as to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered.[11]

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truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U. S. 307 (1979).

[11] Respondents could also have protected themselves from erroneous on-the-scene testing by electing to submit to urine or blood tests, see n. 2, *supra*, because the State automatically would have preserved urine and

III

We conclude, therefore, that the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial.[12] Accordingly, the judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

Rules concerning preservation of evidence are generally matters of state, not federal constitutional, law. See *United States* v. *Augenblick*, 393 U. S. 348, 352–353 (1969). The failure to preserve breath samples does not render a prosecution fundamentally unfair, and thus cannot render breath-analysis tests inadmissible as evidence against the accused. *Id.*, at 356. Similarly, the failure to employ alternative methods of testing blood-alcohol concentrations is of no due

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blood samples for retesting by respondents. Respondents, however, were not informed of the difference between the various testing procedures when they were asked to select among the three available methods of testing blood-alcohol concentrations. But see Cal. Veh. Code Ann. § 13353.5 (West 1971) (enacted in 1983) (requiring suspects to be informed that samples will be retained only in urine and blood tests). To the extent that this and other access-to-evidence cases turn on the underlying fairness of governmental procedures, it would be anomalous to permit the State to justify its actions by relying on procedural alternatives that were available, but unknown to the defendant. Similarly, it is irrelevant to our inquiry that California permits an accused drunken driver to have a second blood-alcohol test conducted by independent experts, since there is no evidence on this record that respondents were aware of this alternative.

[12] State courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution. See, *e. g.*, *Lauderdale* v. *State*, 548 P. 2d 376 (Alaska 1976); *City of Lodi* v. *Hine*, 107 Wis. 2d 118, 318 N. W. 2d 383 (1982).

process concern, both because persons are presumed to know their rights under the law and because the existence of tests not used in no way affects the fundamental fairness of the convictions actually obtained. I understand the Court to state no more than these well-settled propositions. Accordingly, I join both its opinion and judgment.

OHIO v. JOHNSON

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 83-904. Argued April 25, 1984—Decided June 11, 1984

As a result of a killing and a theft of property, respondent was indicted by an Ohio grand jury on one count each of murder, involuntary manslaughter, aggravated robbery, and grand theft. At his arraignment, the trial court, over the State's objection, accepted respondent's guilty pleas to involuntary manslaughter and grand theft, and then granted respondent's motion to dismiss the remaining charges, to which he had pleaded not guilty, on the ground that their further prosecution was barred by the double jeopardy prohibitions of the Fifth and Fourteenth Amendments. The Ohio Court of Appeals and the Ohio Supreme Court affirmed.

Held: The Double Jeopardy Clause does not prohibit the State from continuing its prosecution of respondent on the murder and aggravated robbery charges. Pp. 497-502.

(a) This case does not concern the double jeopardy protection against multiple punishments for the same offense. That protection is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Here, the trial court's dismissal of the more serious charges did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on these charges. The Double Jeopardy Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution. Pp. 497-500.

(b) Nor would further prosecution of the dismissed counts violate the double jeopardy prohibition against multiple prosecutions. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on these counts. Respondent only offered to resolve part of the charges brought against him, while the State objected to disposing of any of the counts against respondent without a trial. He has not been exposed to conviction on these counts, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. Moreover, the acceptance of a guilty plea on the lesser included offenses while the charges on the greater offenses remain pending has none of the implications of an "implied acquittal" that results from a guilty verdict on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the

Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges. Pp. 500–502.

6 Ohio St. 3d 420, 453 N. E. 2d 595, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 503. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 503.

John E. Shoop argued the cause for petitioner. With him on the briefs were *Judson J. Hawkins* and *Joseph M. Gurley*.

Albert L. Purola, by appointment of the Court, 465 U. S. 1019, argued the cause and filed a brief for respondent.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Kenneth Johnson was indicted by an Ohio grand jury for four offenses, ranging from murder to grand theft, as a result of the killing of Thomas Hill and the theft of property from Hill's apartment. Respondent offered to plead guilty to charges of involuntary manslaughter and grand theft, but pleaded not guilty to charges of murder and aggravated robbery. Over the State's objection, the trial court accepted the "guilty" pleas to the lesser offenses, and then granted respondent's motion to dismiss the two most serious charges on the ground that because of his guilty pleas, further prosecution on the more serious offenses was barred by the double jeopardy prohibitions of the Fifth and Fourteenth Amendments. This judgment was affirmed on appeal through the Ohio state courts, and we granted certiorari. 465 U. S. 1004 (1984). We now reverse the judgment of the Supreme Court of Ohio and hold that prosecuting respondent on the two more serious charges would not constitute the type of "multiple prosecution" prohibited by the Double Jeopardy Clause.

Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Carter G. Phillips, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

Thomas Hill was shot to death in his apartment in the city of Mentor-on-the-Lake, a city northeast of Cleveland on Lake Erie. Several weeks later, a county grand jury indicted respondent on one count each of murder,[1] involuntary manslaughter,[2] aggravated robbery,[3] and grand theft.[4] Mean-

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[1] The elements of murder in Ohio are:

"(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code." Ohio Rev. Code Ann. § 2903.02 (1982).

[2] The elements of the crime of involuntary manslaughter are:

"(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

"(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

"(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree." Ohio Rev. Code Ann. § 2903.04 (1982 and Supp. 1983).

[3] The Ohio statutory elements of the crime of aggravated robbery are:

"(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

"(1) Have a deadly weapon or dangerous ordnance . . . on or about his person or under his control;

"(2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree." Ohio Rev. Code Ann. § 2911.01 (1982 and Supp. 1983).

[4] The crime of grand theft in Ohio is defined as follows:

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

"(1) Without the consent of the owner or person authorized to give consent;

"(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

"(3) By deception;

"(4) By threat.

"(B) . . . If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is grand theft, while, respondent had left Ohio and was not arraigned on the charges until nearly two years after the killing. At his arraignment respondent offered to plead guilty only to the charges of involuntary manslaughter and grand theft, while pleading not guilty to the more serious offenses of murder and aggravated robbery. Over the State's objection, the trial court accepted the guilty pleas and sentenced respondent to a term of imprisonment. App. 19–21. Respondent then moved to dismiss the remaining charges against him on the ground that their further prosecution would violate his right under the Double Jeopardy Clause of the Fifth Amendment not to be placed twice in jeopardy for the same offense. The trial court granted respondent's motion and dismissed the remaining charges, finding that because involuntary manslaughter and grand theft were, respectively, lesser included offenses of the remaining charges of murder and aggravated robbery, continued prosecution of the greater offenses after acceptance of respondent's guilty pleas on the lesser offenses was barred by the Double Jeopardy Clause. App. to Pet. for Cert. A24.

The Ohio Court of Appeals and then the Supreme Court of Ohio affirmed the decision of the trial court. 6 Ohio St. 3d 420, 453 N. E. 2d 595 (1983). The State Supreme Court held that in these circumstances aggravated robbery was an "allied offens[e] of similar import" to theft, *id.*, at 422, 453 N. E. 2d, at 598,[5] and reasoned that since state law permitted conviction on only one of these charges, acceptance of respondent's guilty plea to the charge of theft prevented conviction for the charge of aggravated robbery. The crime of involuntary manslaughter was held to be distinguishable from the

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a felony of the fourth degree." Ohio Rev. Code Ann. § 2913.02 (1982 and Supp. 1983).

[5] The term "allied offense," has been interpreted to mean that two crimes share common elements such that the commission of one crime will necessitate commission of the other. *State* v. *Logan*, 60 Ohio St. 2d 126, 128, 397 N. E. 2d 1345, 1347 (1979).

offense of murder only by the mental states required to commit each offense, but that in any one killing, an offender could only be convicted of involuntary manslaughter or murder, but not both crimes.[6]

We think the Supreme Court of Ohio was mistaken in its observation that "this case concerns the third double jeopardy protection prohibiting multiple punishments for the same offense." *Id.*, at 421, 453 N. E. 2d, at 598.[7] The Dou-

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[6] We agree with respondent that the most logical interpretation of the holding below is that the court found involuntary manslaughter to be a lesser included offense of murder. In one sentence of the opinion, however, the mental states of the two crimes are considered mutually exclusive, which would suggest that conviction on one is inconsistent with conviction on the other. See 6 Ohio St. 3d, at 424, 453 N. E. 2d, at 599. In the very next sentence, however, the opinion states that the two offenses are the same under the *Blockburger* test, *i. e.*, involuntary manslaughter is a lesser included offense of the crime of murder. This interpretation accords with the statement in the opinion that the principles of collateral estoppel applied in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), have no relevance to this case.

[7] We face at the threshold an attack on our jurisdiction to review the decision below. Respondent seizes upon the Ohio Supreme Court's reference to state law in its syllabus and in the accompanying opinion to argue that the decision below rested on an adequate and independent state ground. Ordinarily, we have jurisdiction to review a state-court judgment, if the decision "appears to rest primarily on federal law, or to be interwoven with the federal law," or if the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

Here, that presumption must be applied in light of the syllabus rule of the Ohio Supreme Court, which provides that the holding of the case appears in the syllabus, since that is the only portion of the opinion on which a majority of the court must agree. See *State ex rel. Donahey* v. *Edmondson*, 89 Ohio St. 93, 105 N. E. 269 (1913); see also *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 441–442 (1952). But Ohio courts do not suggest that the opinion is not germane to interpreting the court's holding as expressed in its syllabus. *Hart* v. *Andrews*, 103 Ohio St. 218, 221, 132 N. E. 846, 847 (1921). Indeed, where the grounds of the decision are not clearly predicated on state law, we have felt compelled to examine the opinion below to determine whether the Ohio Supreme Court may have ble Jeopardy Clause, of course, affords a defendant three basic protections:

> "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969).

As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety,

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ruled differently if it "had felt free, under our decisions, to do so." *Perkins*, *supra*, at 443.

A review of the court's syllabus indicates that the court did not articulate an independent state-law ground for the decision. The first part of the syllabus refers to state law in determining that, as allied offenses, the State may only obtain convictions on either aggravated robbery or grand theft, but not both. But the syllabus does not explain why the State may not continue to press forward with its prosecution of respondent for aggravated robbery, since the multicount statute that bars multiple convictions for allied offenses plainly admits to the possibility that the State may prosecute allied offenses in a single prosecution. See Ohio Rev. Code. Ann. § 2941.25 (1982 and Supp. 1983). A look at the opinion accompanying the syllabus, however, shows that the judge writing the opinion believed that continued prosecution of respondent on the remaining charges was proscribed by the double jeopardy protection against multiple punishments. 6 Ohio St. 3d, at 421, 453 N. E. 2d, at 597. The federal ground for the court's decision affirming the dismissal of the murder charge is much easier to discern, since the text of the court's syllabus refers directly to the prohibition against double jeopardy. Although the court's reference to double jeopardy might arguably be to the Ohio version, see Ohio Const., Art. I, § 10, the failure to indicate clearly that state double jeopardy protection was being invoked, when coupled with the references in the opinion to our decisions in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and *Ashe* v. *Swenson*, *supra*, convinces us that the Ohio Supreme Court based its decision on its interpretation of the Double Jeopardy Clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment.

and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence. See, *e. g.*, *United States* v. *Wilson*, 420 U. S. 332, 343 (1975); *Green* v. *United States*, 355 U. S. 184, 187–188 (1957).

In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, *United States* v. *Wiltberger*, 5 Wheat. 76, 93 (1820), the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent, see *Missouri* v. *Hunter*, 459 U. S. 359, 366–368 (1983).[8] But where a defendant is retried following conviction, the Clause's third protection ensures that after a subsequent conviction a defendant receives credit for time already served. *North Carolina* v. *Pearce*, *supra*, at 718.

We accept, as we must, the Ohio Supreme Court's determination that the Ohio Legislature did not intend cumulative punishment for the two pairs of crimes involved here. But before respondent can ever be punished for the offenses of murder and aggravated robbery he will first have to be found guilty of those offenses. The trial court's dismissal of these more serious charges did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on these more serious charges. Presumably the trial court, in the event of a guilty verdict on the more serious offenses, will have to confront the question of cumulative punishments as a matter of state law, but because of that court's ruling preventing even the trial of the more serious offenses, that stage of the prosecution was never reached. While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution.

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[8] In the federal courts the test established in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), ordinarily determines whether the crimes are indeed separate and whether cumulative punishments may be imposed. See *Albernaz* v. *United States*, 450 U. S. 333, 337 (1981); *Whalen* v. *United States*, 445 U. S. 684, 691 (1980). As should be evident from our decision in *Missouri* v. *Hunter*, however, the *Blockburger* test does not necessarily control the inquiry into the intent of a state legislature. Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end.

Respondent urges, as an alternative basis for affirming the judgment of the Supreme Court of Ohio, that further prosecution of the counts which were dismissed would violate the double jeopardy prohibition against multiple prosecutions. Brief for Respondent 17–18. He concedes that on the authority of our decision in *Brown* v. *Ohio*, *supra*, the State is not prohibited by the Double Jeopardy Clause from charging respondent with greater and lesser included offenses and prosecuting those offenses in a single trial. Brief for Respondent 7. But, he argues, his conviction and sentence on the charges of involuntary manslaughter and grand theft mean that further prosecution on the remaining offenses will implicate the double jeopardy protection against a second prosecution following conviction. The court below never had occasion to address this argument.[9]

The answer to this contention seems obvious to us. Respondent was indicted on four related charges growing out of a murder and robbery. The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now.

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[9] Respondent also argues that prosecution on the remaining charges is barred by the principles of collateral estoppel enunciated by this Court in *Ashe* v. *Swenson*, 397 U. S. 436 (1970). Even if the two were mutually exclusive crimes, see n. 6, *supra*, the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe* v. *Swenson*. Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.

Previously we have recognized that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense. See *Brown* v. *Ohio*, 432 U. S. 161 (1977). In *Brown* the State first charged the defendant with "joyriding," that is, operating an auto without the owner's consent. The defendant pleaded guilty to this charge and was sentenced. Subsequently, the State indicted the defendant for auto theft and joyriding, charges which this Court held were barred by the Double Jeopardy Clause, since the defendant had previously been convicted in a separate proceeding of joyriding, which was a lesser included offense of auto theft. *Brown* v. *Ohio*, *supra*, at 169.

We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in *Brown* reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. Cf. *Price* v. *Georgia*, 398 U. S. 323, 329 (1970); *Green* v. *United States*, 355 U. S., at 191. There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws. *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978).

We think this is an even clearer case than *Jeffers* v. *United States*, 432 U. S. 137 (1977), where we rejected a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant had been responsible for insisting that there be separate rather than consolidated trials. Here respondent's efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.

For the foregoing reasons we hold that the Double Jeopardy Clause does not prohibit the State from continuing its prosecution of respondent on the charges of murder and aggravated robbery.[10] Accordingly, the judgment of the Ohio Supreme Court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[10] We see no need to address the manner in which the trial court should resolve the question of the existing guilty pleas if the case proceeds to trial, the issue appearing to involve construction of state law and the jurisdiction of Ohio courts to fashion appropriate relief. See Ohio Rule Crim. Proc. 32.1 (1982); cf. *Price* v. *Georgia*, 398 U. S. 323, 332 (1970).

JUSTICE BRENNAN, concurring in part and dissenting in part.

In my view, the judgment of the Ohio Supreme Court with respect to the aggravated robbery charge rests on independent and adequate state grounds. I agree with the Court, however, that continued prosecution of respondent on the charge of murder after respondent pleaded guilty to the charge of involuntary manslaughter was not barred by the Double Jeopardy Clause.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

A conviction based on a plea of guilty has the same legal effect as a conviction based on a jury's verdict. The conviction in this case authorized the State of Ohio to place respondent in prison for several years. As the Court expressly recognizes, "the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been . . . convicted on the lesser included offense." *Ante*, at 501. That statement fits this case precisely. Since it is a correct statement of the law, I would affirm the judgment of the Supreme Court of Ohio insofar as it denied the State the right to prosecute respondent on the charge of murder.*

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*As far as the charge of aggravated robbery is concerned, it is perfectly obvious that the judgment of the Ohio Supreme Court rests on the adequate and independent state ground that it was an "allied offense of similar import" to theft within the meaning of the Ohio rule that precludes prosecution for two such offenses. The Court's cavalier disregard for the state-law basis for this aspect of the judgment of the Supreme Court of Ohio is totally unprecedented.

MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION *v.* JOHNSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-328. Argued April 16, 1984—Decided June 11, 1984

After respondent was convicted in an Arkansas state court on charges of burglary, assault, and murder, the Arkansas Supreme Court set aside the murder conviction, and plea negotiations ensued. A deputy prosecutor proposed to respondent's attorney that in exchange for a guilty plea to a charge of accessory after a felony murder, the prosecutor would recommend a 21-year sentence to be served concurrently with the concurrent burglary and assault sentences. However, when defense counsel called the prosecutor three days later and communicated respondent's acceptance of the offer, the prosecutor told counsel that a mistake had been made and withdrew the offer. He proposed instead that in exchange for a guilty plea he would recommend a 21-year sentence to be served consecutively to the other sentences. Respondent rejected the new offer, but after a mistrial was declared, he ultimately accepted the prosecutor's second offer, and the trial judge imposed a 21-year sentence to be served consecutively to the previous sentences. After exhausting state remedies, respondent sought habeas corpus relief in Federal District Court with respect to his guilty plea. The court dismissed the petition, holding that respondent had understood the consequences of his guilty plea, that he had received effective assistance of counsel, and that because it was not established that he had detrimentally relied on the prosecutor's first proposed plea agreement, respondent had no right to enforce it. However, the Court of Appeals reversed, holding that "fairness" precluded the prosecution's withdrawal of the plea proposal once accepted by respondent.

Held: Respondent's acceptance of the prosecutor's first proposed plea bargain did not create a constitutional right to have the bargain specifically enforced, and he may not successfully attack his subsequent guilty plea. Plea agreements are consistent with the requirements that guilty pleas be made voluntarily and intelligently. If a defendant was not fairly apprised of its consequences, his guilty plea can be challenged under the Due Process Clause. And when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand. However, respondent's plea was in no sense induced by the prosecutor's withdrawn offer, and it rested on no unfulfilled promise; he knew the prosecution would recommend a 21-year consecutive sentence. Thus, because it did not impair the voluntariness or intelligence of his guilty plea, respondent's inability to enforce the prosecutor's first offer is without constitutional significance. Neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. Cf. *Santobello* v. *New York*, 404 U. S. 257. Pp. 507–511.

707 F. 2d 323, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

John Steven Clark, Attorney General of Arkansas, argued the cause for petitioner. With him on the briefs was *Alice Ann Burns*, Deputy Attorney General.

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Gloria C. Phares.*

Richard Quiggle, by appointment of the Court, 465 U. S. 1003, argued the cause and filed a brief for respondent.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a defendant's acceptance of a prosecutor's proposed plea bargain creates a constitutional right to have the bargain specifically enforced.

In the late evening of May 22, 1970, three members of a family returned home to find a burglary in progress. Shots were exchanged resulting in the daughter's death and the wounding of the father and respondent—one of the burglars. Respondent was tried and convicted on three charges: burglary, assault, and murder. The murder conviction was set aside by the Arkansas Supreme Court, *Johnson* v. *State*, 252 Ark. 1113, 482 S. W. 2d 600 (1972). Thereafter, plea negotiations ensued.

At the time of the negotiations respondent was serving his concurrent 21- and 12-year sentences on the burglary and assault convictions. On Friday, October 27, 1972, a deputy prosecutor proposed to respondent's attorney that in exchange for a plea of guilty to the charge of accessory after a felony murder, the prosecutor would recommend a sentence of 21 years to be served concurrently with the burglary and assault sentences. On the following day, counsel communicated the offer to respondent who agreed to accept it. On the next Monday the lawyer called the prosecutor "and communicated [respondent's] acceptance of the offer." App. 10. The prosecutor then told counsel that a mistake had been made and withdrew the offer. He proposed instead that in exchange for a guilty plea he would recommend a sentence of 21 years to be served consecutively to respondent's other sentences.

Respondent rejected the new offer and elected to stand trial. On the second day of trial, the judge declared a mistrial and plea negotiations resumed, ultimately resulting in respondent's acceptance of the prosecutor's second offer. In accordance with the plea bargain, the state trial judge imposed a 21-year sentence to be served consecutively to the previous sentences.

After exhausting his state remedies, respondent filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254.[1] The District Court dismissed the petition, finding that respondent had understood the consequences of his guilty plea, that he had received the effective assistance of counsel, and that because the evidence did not establish that respondent had detrimentally relied on the prosecutor's first proposed plea agreement, respondent had no right to enforce it. The Court of Appeals reversed, 707 F. 2d 323 (CA8 1983), over Judge John R. Gibson's dissent. The majority concluded that "fairness" precluded the prosecution's withdrawal of a plea proposal once accepted by respondent. Because of a conflict in the Circuits,[2] coupled with our concern that an important constitutional question had been wrongly decided, we granted certiorari, 464 U. S. 1017 (1983). We now reverse.[3]

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[1] The petition was referred to a Magistrate who conducted an evidentiary hearing and made recommended findings of fact and conclusions of law, which the District Court subsequently adopted.

Respondent can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution.[4] A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.[5] It is the ensuing guilty plea that implicates the

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[2] Compare *Virgin Islands* v. *Scotland*, 614 F. 2d 360 (CA3 1980), and *United States* v. *Greenman*, 700 F. 2d 1377 (CA11), cert. denied, 464 U. S. 992 (1983), with *Cooper* v. *United States*, 594 F. 2d 12 (CA4 1979).

[3] This case is not moot despite the fact that respondent has been paroled. Respondent remains in the "custody" of the State, see *Jones* v. *Cunningham*, 371 U. S. 236 (1963); see generally *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 300–302 (1984); *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973); and whether respondent must serve the sentence now under attack consecutively to his prior sentences will affect the date at which his parole will expire under state law, see Ark. Stat. Ann. § 43–2807(c) (Supp. 1983). Respondent's challenge to the duration of his custody therefore remains live.

[4] *E. g.*, *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963). In pertinent part, the habeas statute provides:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a).

[5] Under Arkansas law, there is no entitlement to have the trial court impose a recommended sentence since a negotiated sentence recommendation does not bind the court, see *Varnedare* v. *State*, 264 Ark. 596, 599, 573 S. W. 2d 57, 60 (1978); *Marshall* v. *State*, 262 Ark. 726, 561 S. W. 2d 76 (1978); Ark. Rule Crim. Proc. 25.3(c); there is a critical difference between an entitlement and a mere hope or expectation that the trial court will follow the prosecutor's recommendation, see *Olim* v. *Wakinekona*, 461 U. S. 238, 248–251 (1983); *Jago* v. *Van Curen*, 454 U. S. 14, 19–21 (1981) *(per curiam)*; *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 465–467 (1981); *Meachum* v. *Fano*, 427 U. S. 215, 226–227 (1976).

Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.[6]

It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.[7] It is also well settled that plea agreements are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.[8] It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired. In *Brady* v. *United States*, 397 U. S. 742 (1970), we stated the applicable standard:

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[6] See *Boykin* v. *Alabama*, 395 U. S. 238 (1969); *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927).

[7] See *Tollett* v. *Henderson*, 411 U. S. 258, 266–267 (1973); *North Carolina* v. *Alford*, 400 U. S. 25, 31 (1970); *Parker* v. *North Carolina*, 397 U. S. 790, 797–798 (1970); *McMann* v. *Richardson*, 397 U. S. 759, 772 (1970); *Brady* v. *United States*, 397 U. S. 742, 747–748 (1970). See also *Henderson* v. *Morgan*, 426 U. S. 637 (1976); *Menna* v. *New York*, 423 U. S. 61 (1975) *(per curiam)*.

[8] See *Corbitt* v. *New Jersey*, 439 U. S. 212, 219–220, 222–223 (1978); *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978); *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977); *Santobello* v. *New York*, 404 U. S. 257, 260–261 (1971). For example, in *Brady* v. *United States* we wrote:

> "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury." 397 U. S., at 752 (footnotes omitted).

> "'[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).'" *Id.*, at 755 (quoting *Shelton* v. *United States*, 246 F. 2d 571, 572, n. 2 (CA5 1957) (en banc) (in turn quoting 242 F. 2d 101, 115 (Tuttle, J., dissenting to panel opinion)), rev'd on other grounds, 356 U. S. 26 (1958).

Thus, only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause. *Santobello* v. *New York*, 404 U. S. 257 (1971), illustrates the point. We began by acknowledging that the conditions for a valid plea "presuppose fairness in securing agreement between an accused and a prosecutor. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Id.*, at 261–262. It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.*, at 262.[9]

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[9] See also 404 U. S., at 266 (Douglas, J., concurring); *id.*, at 269 (MARSHALL, J., concurring in part and dissenting in part).

Santobello demonstrates why respondent may not successfully attack his plea of guilty. Respondent's plea was in no sense induced by the prosecutor's withdrawn offer; unlike Santobello, who pleaded guilty thinking he had bargained for a specific prosecutorial sentencing recommendation which was not ultimately made, at the time respondent pleaded guilty he knew the prosecution would recommend a 21-year consecutive sentence. Respondent does not challenge the District Court's finding that he pleaded guilty with the advice of competent counsel and with full awareness of the consequences—he knew that the prosecutor would recommend and that the judge could impose the sentence now under attack.[10] Respondent's plea was thus in no sense the product of governmental deception; it rested on no "unfulfilled promise" and fully satisfied the test for voluntariness and intelligence.

Thus, because it did not impair the voluntariness or intelligence of his guilty plea, respondent's inability to enforce the prosecutor's offer is without constitutional significance.[11]

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[10] Respondent suggests that the prosecutor's withdrawal of the initial offer undermined his confidence in defense counsel, in violation of his Sixth Amendment right to counsel. This argument is simply at odds with reason. Prosecutors often come to view an offense more seriously during the course of pretrial investigation for reasons entirely unrelated to what defense counsel has done or is likely to do. See *United States* v. *Goodwin*, 457 U. S. 368, 381 (1982). We fail to see how an accused could reasonably attribute the prosecutor's change of heart to his counsel any more than he could have blamed counsel had the trial judge chosen to reject the agreed-upon recommendation, or, for that matter, had he gone to trial and been convicted. The District Court and the Court of Appeals concluded that counsel effectively advised respondent; that is all the Constitution requires. See *United States* v. *Cronic*, 466 U. S. 648, 656–657, n. 19 (1984); *Tollett* v. *Henderson*, 411 U. S., at 266–268; *Parker* v. *North Carolina*, 397 U. S., at 797–798; *McMann* v. *Richardson*, 397 U. S., at 770–771.

[11] Indeed, even if respondent's plea were invalid, *Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea; the Court made it clear that permitting Santobello to replead was within the range of constitutionally appropriate remedies. See 404 U. S., at 262–263; see also

Neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.[12] Here respondent was not deprived of his liberty in any fundamentally unfair way. Respondent was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now.

The judgment of the Court of Appeals is

Reversed.

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id., at 268–269 (MARSHALL, J., concurring in part and dissenting in part). It follows that respondent's constitutional rights could not have been violated. Because he pleaded after the prosecution had breached its "promise" to him, he was in no worse position than Santobello would have been had he been permitted to replead.

[12] *Santobello* itself rejected the relevance of prosecutorial culpability: "It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Id.*, at 262. Cf. *United States* v. *Agurs*, 427 U. S. 97, 110 (1976).

FRANCHISE TAX BOARD OF CALIFORNIA *v.* UNITED STATES POSTAL SERVICE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–372. Argued April 17, 1984—Decided June 11, 1984

After determining that four employees of appellee United States Postal Service were delinquent in their payment of state income taxes, appellant Franchise Tax Board of California served process on appellee ordering it to withhold the delinquent amounts from the employees' wages pursuant to a provision of the California Revenue and Taxation Code. When appellee refused to comply, appellant filed an action in Federal District Court, alleging that appellee was liable under the Code for failing to honor the orders. The District Court entered summary judgment for appellee, holding that 5 U. S. C. § 5517, which authorized the agreement that California and the United States had made regarding the withholding of state income taxes from federal employees' pay, applied only to withholding of anticipated tax liabilities and not to delinquent liabilities. The Court of Appeals affirmed, rejecting appellant's argument that 39 U. S. C. § 401(1), which provides that appellee may "sue and be sued in its official name," had waived any sovereign immunity that appellee might possess.

Held: When administrative process of the type employed by appellant issues against appellee, it has been "sued" within the meaning of § 401(1), and must respond to that process. Pp. 516–525.

(a) Not only must this Court liberally construe the sue-and-be-sued clause of § 401(1), but it also must presume that appellee's liability is the same as that of any other business. *FHA* v. *Burr,* 309 U. S. 242. No showing has been made to overcome that presumption. Since an order to withhold cannot issue unless appellee owes the employee wages, appellee is nothing but a stakeholder; the order has the same effect on its ability to operate efficiently as it does that of any other employer subject to the California statute. Pp. 516–521.

(b) It would be illogical to conclude that Congress differentiated between process issued by an administrative agency such as appellant and that of a court, for even if a court issued the order to withhold, neither appellee nor its employees would be in a materially different position. In operation and effect, appellant's orders to withhold are identical to a court judgment, since they give rise to a binding obligation to pay the assessed amounts. Neither appellee nor its employees would obtain any additional protections from a requirement that such orders be issued by a court, since the liability cannot be contested until after the tax has been paid and a refund action brought. Moreover, to construe § 401(1) to require the issuance of judicial process before appellee need honor an order to withhold would create unwarranted disruption of the State's delinquent tax collection process, while simultaneously depriving the orders of some of their efficacy. Pp. 521–525.

698 F. 2d 1029, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Patti S. Kitching, Deputy Attorney General of California, argued the cause for appellant. With her on the briefs were *John K. Van De Kamp*, Attorney General, and *Edmond B. Mamer*, Deputy Attorney General.

David A. Strauss argued the cause for appellee. With him on the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *Joan M. Bernott.**

JUSTICE STEVENS delivered the opinion of the Court.

Appellant, the Franchise Tax Board of California, determined that four employees of appellee United States Postal Service were delinquent in the payment of their state income taxes. The Board served process on the Postal Service directing it to withhold the amounts of the delinquencies from the employees' wages, pursuant to § 18817 of the California Revenue and Taxation Code, which authorizes the Board to require any employer to withhold delinquent taxes from an employee's salary and transfer those funds to the Board.[1] The question presented is whether the Postal Service was obligated to honor these "orders to withhold."

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*A brief of *amici curiae* urging reversal was filed for the State of Delaware et al. by *Stephen H. Sachs*, Attorney General of Maryland, and *Diane G. Motz*, Assistant Attorney General, *Charles M. Oberly III*, Attorney General of Delaware, and *John Fidele*, Deputy Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Kent G. Harbison*, Chief Deputy Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, and *William F. Gary*, Deputy Attorney General, and *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Jay A. Molluso*, Chief Deputy Attorney General.

I

When the Postal Service refused to comply with the four orders to withhold, the Board filed this action in the United States District Court for the Central District of California asserting that the Service was liable under the Revenue and Taxation Code for failing to honor the orders,[2] and invoking federal jurisdiction pursuant to 39 U. S. C. § 409(a) and 28 U. S. C. § 1339.[3] The District Court entered summary judgment for the Postal Service. It held that 5 U. S. C. § 5517, which authorized the agreement that California and the United States had made regarding the withholding of state income taxes from the pay of federal employees, applies only to withholding of anticipated tax liabilities and not to delinquent liabilities.[4] The Court of Appeals affirmed, agreeing that 5 U. S. C. § 5517 excused the Service from complying with the orders. *Employment Development Department* v. *United States Postal Service*, 698 F. 2d 1029 (CA9 1983).[5] The Court of Appeals rejected the Board's argument that § 5517 did not prohibit issuance of the orders, and also rejected the argument that the provision in 39 U. S. C. § 401(1) declaring that the Postal Service may "sue and be sued in its official name" had waived any sovereign immunity that the Service might possess.[6] This appeal followed.[7]

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[1] The statute provides in pertinent part:

"The Franchise Tax Board may by notice, served personally or by first-class mail, require any employer . . . having in [its] possession, or under [its] control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate. . . ." Cal. Rev. & Tax. Code Ann. § 18817 (West 1983).

[2] See Cal. Rev. & Tax. Code Ann. § 18818 (West 1983) ("Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts").

[3] Section 1339 vests in district courts jurisdiction over any action arising under an Act of Congress relating to the Postal Service. Section 409(a) provides:

"Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court . . . ."

In this Court, the Postal Service does not argue that 5 U. S. C. § 5517 and the agreement pursuant thereto between the United States and California prohibit the issuance of an order to withhold against the Postal Service with respect to delinquent tax liabilities of its employees.[8] To the contrary, the Postal Service expressly concedes that it is amenable to judicial process and could be required to honor a garnishment order requiring it to withhold the salary of a federal employee in order to satisfy a delinquent tax liability if issued by a state court.[9] Instead, the Postal Service contends that although it must obey a judicial order, it retains sovereign immunity with respect to state administrative tax levies. It argues that while the provision that the Postal Service can "sue and be sued in its official name" waives immunity from suit, it does not apply to administrative proceedings.

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[4] In the alternative, the District Court held that the state statute obligating employers to honor orders to withhold did not apply to the Postal Service.

[5] However, the Court of Appeals disagreed with the District Court's construction of the state statute, concluding that it did authorize issuance of the orders to withhold to the Postal Service.

[6] Judge Schroeder dissented, arguing that § 401(1) constituted a waiver of the Postal Service's immunity from process, including the type of process embodied in the orders to withhold.

[7] While the Court of Appeals did not say in so many words that §§ 18817 and 18818 could not constitutionally be applied to the Postal Service, it did expressly hold that the state statute required the Postal Service to honor the orders to withhold. Therefore, a necessary predicate to the Court of Appeals' holding is that enforcement of the state statute would be inconsistent with federal law and hence invalid under the Supremacy Clause of the Constitution. See *California* v. *Grace Brethren Church*, 457 U. S. 393, 405–407 (1982); *United States* v. *Clark*, 445 U. S. 23, 26, n. 2 (1980). Accordingly, we have jurisdiction over this appeal under 28 U. S. C. § 1254(2). See *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958).

[8] As the text of § 5517 makes clear, it simply authorizes withholding agreements that otherwise the United States might be without statutory authority to enter, and limits the waiver of sovereign immunity with respect to these agreements. It does not concern the scope of the Postal Service's amenability to process under 39 U. S. C. § 401(1):

II

The Board does not dispute the proposition that, unless waived, sovereign immunity prevents the creditor of a fed-

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"(a) When a State statute—

"(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

"(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. . . .

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency."

[9] See Brief for Appellee 13–15. In fact, the Postal Service's regulations provide for withholding of employees' wages when garnished by court order, United States Postal Service, Financial Management Manual § 431.1(g) (1978); see 39 CFR § 211.2(a)(2) (1983).

eral employee from collecting a debt through a judicial order requiring the United States to garnishee the employee's salary. See *Buchanan* v. *Alexander*, 4 How. 20 (1845). Rather, it places its primary reliance on 39 U. S. C. § 401(1), which indicates that the Postal Service may "sue and be sued." Thus the question in this case is whether this statutory waiver of sovereign immunity extends to the Board's orders to withhold.

This Court construed a statute providing that an agency created by Congress—the Federal Housing Authority—was empowered "to sue and be sued," in *FHA* v. *Burr*, 309 U. S. 242 (1940). In *Burr* the question presented was whether the agency had to honor a garnishment order issued by a state court. The Court began by observing: "Since consent to 'sue and be sued' has been given by Congress, the problem here merely involves a determination of whether or not garnishment comes within the scope of that authorization." *Id.*, at 244. It continued:

> "[W]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of

> Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *Id.*, at 245 (footnote omitted).[10]

The Court then explained why garnishment orders fell within the scope of the statutory waiver of sovereign immunity:

> "Clearly the words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debt. . . . [H]owever it may be denominated, whether legal or equitable, and whenever it may be available, whether prior to or after final judgment, garnishment is

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[10] Accord, *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81, 84–85 (1941); *United States* v. *Shaw*, 309 U. S. 495, 501 (1940). See also *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 280–281 (1959); *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 580 (1943). See generally *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 359 (1955) ("[E]ven the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment"). Justice Frankfurter, writing for a unanimous Court in the Term prior to *Burr*, foreshadowed *Burr's* approach to waivers of sovereign immunity:

"Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390–391 (1939) (footnotes omitted).

> a well-known remedy available to suitors. To say that Congress did not intend to include such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." *Id.*, at 245–246 (footnotes and citation omitted).

If anything, the waiver of sovereign immunity is broader here than it was in *Burr*. In passing the Postal Reorganization Act of 1970, 84 Stat. 719, Congress not only indicated that the Postal Service could "sue and be sued," 39 U. S. C. § 401(1), but also that it had the power "to settle and compromise claims by or against it," § 401(8), and that "[t]he provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." § 409(c).[11] Neither of these provisions would have been necessary had Congress intended to preserve sovereign immunity with respect to the Postal Service.[12] Congress also indicated that it wished the

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[11] Chapter 171 of Title 28 governs procedure under the Federal Tort Claims Act, 28 U. S. C. §§ 2671–2680.

[12] The nearly universal conclusion of the lower federal courts has been that the Postal Reorganization Act constitutes a waiver of sovereign immunity. See *Insurance Co. of North America* v. *United States Postal Service*, 675 F. 2d 756, 758 (CA5 1982); *Portmann* v. *United States*, 674 F. 2d 1155, 1168 (CA7 1982); *Associates Financial Services of America, Inc.* v. *Robinson*, 582 F. 2d 1 (CA5 1978) *(per curiam); Beneficial Finance Co. of New York, Inc.* v. *Dallas*, 571 F. 2d 125 (CA2 1978); *General Electric Credit Corp.* v. *Smith*, 565 F. 2d 291 (CA4 1977) *(per curiam); Goodman's Furniture Co.* v. *United States Postal Service*, 561 F. 2d 462 (CA3 1977); *May Department Stores Co.* v. *Williamson*, 549 F. 2d 1147 (CA8 1977); *Standard Oil Division* v. *Starks*, 528 F. 2d 201 (CA7 1975) *(per curiam); Kennedy Electric Co.* v. *United States Postal Service*, 508 F. 2d 954, 957 (CA10 1974); *Butz Engineering Corp.* v. *United States*, 204 Ct. Cl. 561, 566–567, 499 F. 2d 619, 621–622 (1974); *Milner* v. *Bolger*, 546 F. Supp. 375 (ED Cal. 1982); *Lutz* v. *United States Postal Service*, 538 F. Supp. 1129, 1132 (EDNY 1982); *Lincoln National Bank & Trust Co.* v. *Marotta*, 442 F. Supp. 49 (NDNY 1977); *Bank of Virginia* v. *Tompkins*, 434 F. Supp. 787 (ED Va. 1977); *United Virginia Bank/National* v. *Eaves*, 416 F. Supp. 518

Postal Service to be run more like a business than had its predecessor, the Post Office Department.[13]

Here, the Board has employed the same "well-known" remedy that was held to be within the scope of a sue-and-be-sued clause in *Burr*. Moreover, as was true of the agency involved in *Burr*, Congress has "launched [the Postal Service] into the commercial world"; hence under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the Service's liability is the same as that of any other business. No showing has been made to overcome that presumption. Since an order to withhold cannot issue unless the Postal Service owes the employee wages, the Service is nothing but a stakeholder; the order to withhold has precisely the same effect on its ability to operate efficiently as it does on that of any other employer subject to the California statute. It creates no greater inconvenience than did the garnishment order that this Court held could issue against a federal agency in *Burr*.[14] Indeed, the Board's

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(ED Va. 1976); *Iowa-Des Moines National Bank* v. *United States*, 414 F. Supp. 1393 (SD Iowa 1976); *Colonial Bank* v. *Broussard*, 403 F. Supp. 686 (ED La. 1975). But see *Nolan* v. *Woodruff*, 68 F. R. D. 660 (DC 1975); *Drs. Macht, Podore & Associates, Inc.* v. *Girton*, 392 F. Supp. 66 (SD Ohio 1975); *Lawhorn* v. *Lawhorn*, 351 F. Supp. 1399 (SD W. Va. 1972); *Detroit Window Cleaners Local 139 Insurance Fund* v. *Griffin*, 345 F. Supp. 1343 (ED Mich. 1972).

[13] See H. R. Rep. No. 91-1104, pp. 5, 11-12 (1970); 116 Cong. Rec. 19846 (1970) (remarks of Rep. Corbett); *id.*, at 20226 (remarks of Rep. Udall). Perhaps the clearest practical expression of this intent was Congress' decision to create a new postal rate structure designed to make the Postal Service self-supporting. See 39 U. S. C. § 3621; H. R. Rep. No. 91-1104, pp. 16-17 (1970). See also *National Assn. of Greeting Card Publishers* v. *United States Postal Service*, 462 U. S. 810, 813-814 (1983).

[14] In *Burr*, the Court rejected the argument that the burden of responding to garnishment actions would interfere with its ability to perform its functions. See 309 U. S., at 249. Moreover, the burden upon the Postal Service of responding to the Board's orders to withhold is no greater than the burden it would face if it had to comply with a similar order issued by a state court, which the Postal Service concedes would not be barred by sovereign immunity. It should be noted that the Postal Service cannot be

order to withhold contains the same direction as did the writ of garnishment served on the FHA in *Burr.*

The Postal Service attempts to distinguish *Burr* by observing that the waiver of sovereign immunity in § 401(1) is limited to cases in which it has been "sued," and then arguing that because the process that has issued here is that of an administrative agency rather than a court, the Service has not been "sued" within the meaning of § 401(1). This crabbed construction of the statute overlooks our admonition that waiver of sovereign immunity is accomplished not by "a ritualistic formula"; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 389 (1939).[15] In this

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held liable for honoring the orders to withhold, see Cal. Tax. & Rev. Code Ann. § 18819 (West 1983).

[15] Accord, *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S., at 84. See also *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935) (in order to interpret waiver of sovereign in a practical manner, sue-and-be-sued clause construed to extend to permit prejudgment attachment). In *Keifer & Keifer*, the Court wrote:

"Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. For more than a hundred years corporations have been used as agencies for doing work of government. Congress may create them 'as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the States.' But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law, such as '*warrantizio*' or 'to A and his heirs,' for which there were no substitutes and without which desired legal consequences could not be wrought.

"Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may case, at the level of policy and practicality it is illogical to conclude that Congress would have differentiated between process issued by the Board and that of a court, for even if a court issued the orders to withhold, neither the Postal Service nor its employees would be in a materially different position.

The operation of California's tax collection process makes it clear that there is no meaningful difference between an order to withhold issued by the Board and a garnishment order issued by a court. Under state law an assessment that has been validly made against a taxpayer[16] operates to impose an absolute liability for the tax that may not be contested except in an action seeking refund of amounts already paid. Indeed state law is unequivocal in requiring employers to honor orders to withhold—no defense is permitted.[17] Thus, a Califor-

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not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of government agencies from suit." 306 U. S., at 388–389 (citations omitted) (quoting *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529 (1894)).

[16] California law requires that a taxpayer receive notice and opportunity for hearing prior to the assessment of a deficiency, both before the Board and then before the State Board of Equalization through an administrative appeal. See Cal. Rev. & Tax. Code Ann. §§ 18581-18602 (West 1983). No question is raised as to the constitutional sufficiency of the notice and opportunity for hearing that the four Postal Service employees received. See generally *Commissioner* v. *Shapiro*, 424 U. S. 614, 629–632, and n. 12 (1976).

[17] Cal. Rev. & Tax. Code Ann. § 18819 (West 1983) ("Any employer or person required to withhold and transmit any amount pursuant to this article shall comply with the requirement without resort to any legal or equitable action in a court of law or equity"); see *Kanarek* v. *Davidson*, 85 Cal. App. 3d 341, 346, 148 Cal. Rptr. 86, 89 (1978). California courts will not entertain a suit contesting the assessment of a tax until after the taxpayer has exhausted his administrative refund remedy. See *Aronoff* v. *Franchise Tax Board*, 60 Cal. 2d 177, 180–181, 383 P. 2d 409, 411 (1963). Moreover, California law prohibits the issuance of an injunction restraining the

nia tax assessment, like a federal tax assessment, operates in a way that is functionally indistinguishable from the judgment of a court of law; it creates an absolute legal obligation to make payment by a date certain:

> "Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligations calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." *Bull* v. *United States*, 295 U. S. 247, 259–260 (1935).[18]

Thus, in operation and effect the Board's orders to withhold are identical to the judgment of a court. They give rise to a binding legal obligation to pay the assessed amounts; the taxpayer may no more dispute this liability than the liability under any other judgment. Neither the Postal Service nor its employees would obtain any additional protections from a requirement that such orders be issued by a court, since the liability cannot be contested until after the tax has been paid

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assessment or collection of any tax, Cal. Const., Art. XIII, § 32; Cal. Rev. & Tax. Code § 19081 (West 1983); see *California* v. *Grace Brethren Church*, 457 U. S., at 400–401, n. 10, 415.

[18] See *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 352, n. 18 (1977); *Palmer* v. *McMahon*, 133 U. S. 660, 669 (1890); *Hager* v. *Reclamation District No. 108*, 111 U. S. 701, 710 (1884). See also *Randall* v. *Franchise Tax Board*, 453 F. 2d 381 (CA9 1971); *Greene* v. *Franchise Tax Board*, 27 Cal. App. 3d 38, 44, 103 Cal. Rptr. 483, 486–487 (1972).

and a refund action brought.[19] At the same time, construing the statute to require the issuance of judicial process before the Postal Service need honor an order to withhold would create unwarranted disruption of the State's machinery for collection of delinquent taxes,[20] while simultaneously depriving the orders of "some of their efficacy"—a result inconsistent with *Burr*.

There is thus no reason to believe that Congress intended to impose a meaningless procedural requirement that an order to withhold be issued by a court. To distinguish between administrative and judicial process would be to take an approach to sovereign immunity that this Court rejected more than 40 years ago—"to impute to Congess a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none." *Keifer & Keifer*, 306 U. S., at 394.[21] In cases of this kind, we believe

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[19] The Postal Service argues that there is a significant distinction between administrative and judicial garnishment because it can remove the latter proceeding, unlike the former, to federal court under 39 U. S. C. § 409(a). However, as an initial matter it is far from clear that the Postal Service may remove a garnishment action when it is merely a stakeholder and the real party in interest is the employee. See *Jones Store Co.* v. *Hammons*, 424 F. Supp. 494 (WD Mo. 1977); *Armstrong Cover Co.* v. *Whitfield*, 418 F. Supp. 972 (ND Ga. 1976). See also *Murray* v. *Murray*, 621 F. 2d 103 (CA5 1980). Even assuming that such a case is removable, the facts of this case demonstrate the fallacy in the Postal Service's argument. If the Service feels it has a meritorious defense to the order to withhold, though it is hard to see how it could, see *supra*, at 522–523, it remains free to refuse to honor the order to withhold and force the Board to file suit against it, as it did here, or else it can initiate its own lawsuit against the Board under § 409(a).

[20] See generally *California* v. *Grace Brethren Church*, 457 U. S., at 410–411; *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981); *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981); *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 298 (1943).

[21] In *Keifer & Keifer*, the Court held that a Regional Agricultural Credit Corporation, a Government corporation, was not protected by sovereign immunity even though its authorizing legislation contained no sue-and-be-sued clause; since its parent corporation and a wide variety of similarly sit-

Congress intended the Postal Service to be treated similarly to other self-sustaining commercial ventures. Accordingly, we hold that when administrative process of the type employed by the Board issues against the Postal Service, it has been "sued" within the meaning of § 401(1), and must respond to that process.[22]

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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uated entities did not have immunity, the Court concluded that Congress could not have intended a different result with respect to the regional corporation. See 306 U. S., at 392–394. See also *Federal Land Bank* v. *Priddy*, 295 U. S., at 235–236.

[22] The Postal Service argues that Congress must have intended the Board to employ the "piggyback" provisions for collecting delinquent state tax liabilities found in 26 U. S. C. §§ 6361–6365, since they were passed to address this problem. However, nothing in that statute, which permits States to use the summary collection procedures of the Internal Revenue Service, limits the power of States to use any other available procedure. The Postal Service also argues that when Congress enacted 5 U. S. C. § 5520 in 1974, providing for the United States to enter withholding agreements for city and county income taxes, it must have assumed that the Service retained its sovereign immunity. Section 5520 is, however, no more relevant to this case than § 5517; both provide the Secretary of the Treasury with explicit authority to enter into withholding agreements which he might not otherwise be able to make; neither addresses the scope of the Service's sovereign immunity. See n. 8, *supra*. Moreover, the Postal Service's position that Congress intended use of only §§ 5517, 5520, and the piggyback provisions of the Internal Revenue Code to collect state taxes is inconsistent with the Service's position that it has no immunity from a judicial garnishment order. In light of our disposition, we need not reach the Board's contention that the Buck Act, 4 U. S. C. §§ 105–110, requires the Postal Service to honor the orders to withhold.

LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–432. Argued January 9, 1984—Decided June 12, 1984

Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) provides a "Bill of Rights" for labor union members, including various protections for members involved in union elections. Section 102 provides that any person whose Title I rights have been violated may bring an action in federal district court "for such relief (including injunctions) as may be appropriate." Title IV of the Act provides an elaborate postelection procedure aimed at protecting union democracy through free and democratic elections. Section 402 provides that if the Secretary of Labor (Secretary), upon complaint by a union member, finds probable cause to believe that a violation of Title IV election proceedings has occurred, he shall bring an action against the union in federal district court to set aside the election and to order a new election under the supervision of the Secretary. Section 403 provides that the remedy prescribed by Title IV for challenging an election already conducted shall be exclusive. Petitioner union, in preparation for an election scheduled for the last two months of 1980, held a meeting to nominate candidates for its executive board. Admission to the meeting was restricted to those union members who could produce a computerized receipt showing that their union dues had been paid. One of the respondents was among those members who were prohibited from entering the meeting for not possessing such a receipt. There was also a disagreement at the meeting as to the office for which another respondent had been nominated. These respondents and other respondent union members then filed a protest with the union, but it was denied. Election ballots were thereafter distributed with instructions that they be returned by mail so as to arrive in a designated post office box by 9 a. m. on December 13, 1980, at which time they were to be counted. On December 1, 1980, after the ballots had been distributed, respondents filed an action in Federal District Court, alleging that the union and petitioner union officers had violated Title I, and seeking a preliminary injunction. On December 12, the court issued a temporary restraining order halting the election. This was followed by several months of negotiations between the parties and hearings before the court. Ultimately, holding that Title I remedies were not foreclosed when Title I violations occurred during the course of an election and rejecting petitioners' argument that respondents' exclusive remedy was to file a complaint with the Secretary under Title IV, the court issued a preliminary injunction and an order declaring the interrupted election invalid, setting forth detailed procedures to be followed during a new election, and appointing outside arbitrators to supervise implementation of the procedures. The Court of Appeals affirmed.

Held: The District Court overstepped the bounds of "appropriate" relief under Title I when it enjoined an ongoing union election and ordered that a new election be held pursuant to procedures imposed by the court. Pp. 535–551.

(a) While § 102, standing by itself, suggests that individual union members may properly maintain a Title I suit whenever rights guaranteed by that Title have been violated, that section explicitly limits relief that may be ordered by a district court to that which is "appropriate" to any given situation. Moreover, while Title IV protects many of the same rights as does Title I, § 402 of Title IV sets up an exclusive method for protecting Title IV rights, and under this method individuals are not permitted to block or delay union elections by filing suits for violation of Title IV. Pp. 536–540.

(b) Whether suits alleging violations of Title I may properly be maintained during the course of a union election depends upon the appropriateness of the remedy required to eliminate the claimed violations. In the absence of legislative history suggesting that Congress intended to require or allow courts to pre-empt the Secretary's expertise and supervise their own elections, and given the clear congressional preference expressed in Title IV for supervision of new elections by the Secretary, the conclusion is compelled that Congress did not consider court supervision of union elections to be an "appropriate" remedy for a Title I suit filed during the course of an election. Thus, if the remedy sought is invalidation of an election already being conducted and court supervision of a new election, union members must utilize the remedies provided by Title IV. For less intrusive remedies sought during an election, however, a district court retains authority to order appropriate relief under Title I. Pp. 540–550.

(c) The District Court's order here directly interfered with the Secretary's exclusive responsibilities for supervising new elections and was inconsistent with the basic objectives of the LMRDA enforcement scheme. Pp. 550–551.

679 F. 2d 978, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and

O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 552.

Gary S. Witlen argued the cause for petitioners. With him on the briefs was *David Previant*.

John H. Garvey argued the cause for the federal respondent under this Court's Rule 19.6, urging reversal. With him on the briefs were *Solicitor General Lee, Deputy Solicitor General Geller, T. Timothy Ryan, Jr., Karen I. Ward, Mary-Helen Mautner*, and *John A. Bryson*.

Mark D. Stern argued the cause for respondents Crowley et al. With him on the brief was *Kurt M. Pressman*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act), 73 Stat. 522, as amended, 29 U. S. C. § 401 *et seq.*, was Congress' first major attempt to regulate the internal affairs of labor unions. Title I of the Act provides a statutory "Bill of Rights" for union members, including various protections for members involved in union elections, with enforcement and appropriate remedies available in district court. Title IV, in contrast, provides an elaborate postelection procedure aimed solely at protecting union democracy through free and democratic elections, with primary responsibility for enforcement lodged with the Secretary of Labor. Resolution of the question presented by this case requires that we address the conflict that exists between the separate enforcement mechanisms included in these two Titles. In particular, we must determine whether suits alleging violations of Title I may properly be maintained in district court during the course of a union election.

The Court of Appeals approved a preliminary injunction issued by the District Court that enjoined an ongoing union

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**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Arthur L. Fox II and *Alan B. Morrison* filed a brief for Union Democracy as *amicus curiae* urging affirmance.

election and ordered the staging of a new election pursuant to procedures promulgated by the court. After reviewing the complex statutory scheme created by Congress, we conclude that such judicial interference in an ongoing union election is not appropriate relief under § 102 of Title I, 29 U. S. C. § 412. We therefore reverse the Court of Appeals.

I

Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers (Local 82) represents approximately 700 employees engaged in the furniture moving business in the Boston, Mass., area.[1] The union is governed by a seven-member executive board whose officers, pursuant to § 401(b) of the LMRDA, 29 U. S. C. § 481(b), must be chosen by election no less than once every three years. These elections, consistent with the executive board's discretion under the union's bylaws and constitution, have traditionally been conducted by mail referendum balloting. The dispute giving rise to the present case stems from the union election that was regularly scheduled for the last two months of 1980.

On November 9, 1980, Local 82 held a meeting to nominate candidates for positions on its executive board. The meeting generated considerable interest, in part because dissident members of the union were attempting to turn the incumbent union officials out of office. Two aspects of the controversial meeting are especially important for present purposes. First, admission to the meeting was restricted to those members who could produce a computerized receipt showing that their dues had been paid up to date. Several union members, including respondent Jerome Crowley, were prohibited from entering the meeting because they did not have such dues receipts in their possession. Second, during the actual nominations process, there was disagreement relating to the office for which respondent John Lynch had been nominated. At the close of nominations, petitioner Bart Griffiths, the union's incumbent secretary-treasurer, declared himself the only candidate nominated for that office; at the same time, he included Lynch among the candidates selected to run for union president.

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[1] Also appearing as petitioners before this Court are George Harris, former president of Local 82, Bart Griffiths, secretary-treasurer of Local 82, Phillip Piemontese, chairman of the election committee of Local 82, and several unidentified members of that election committee.

Several dissatisfied members of the union, now respondents before this Court,[2] filed a protest with the union. On November 20, their protest was denied by Local 82.[3] Election ballots were thereafter distributed to all members of the union, who were instructed to mark and return the ballots by mail so that they would arrive in a designated post office box by 9 a. m. on December 13, 1980, at which time they were scheduled to be counted. Respondent Lynch's name appeared on the ballot as a candidate for president, and not for secretary-treasurer.

On December 1, 1980, after the distribution of ballots had been completed, the respondents filed this action in the United States District Court for the District of Massachusetts. They alleged, *inter alia*, that Local 82 and its officers had violated several provisions of Title I of the LMRDA, and sought a preliminary injunction. In particular, the respondents claimed that restricting admission to the nominations meeting to those members who could produce computerized dues receipts violated their "equal rights . . . to nominate candidates [and] to attend membership meetings" under § 101(a)(1) of the Act,[4] as well as their right freely to express views at meetings of the union under § 101(a)(2) of the Act.[5] They also alleged that the union and its officers had violated § 101(a)(1) by failing to recognize respondent Lynch as a candidate for secretary-treasurer.[6]

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[2] In addition to Jerome Crowley and John Lynch, respondents before this Court include Anthony Coyne, Joseph Fahey, Robert Lunnin, James Hayes, Gerald Owens, Joseph Trask, Joseph Montagna, and Dennis Bates.

[3] The respondents also filed protests with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the international union with which Local 82 is affiliated, and with Teamsters Joint Council 10, the regional body containing Local 82. No action was ever taken by the international union, and a hearing scheduled by the regional body for December 23, 1980, was canceled after the present lawsuit was filed.

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[4] Section 101(a)(1) of the LMRDA provides in full:

"EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws." 73 Stat. 522, 29 U. S. C. § 411(a)(1).

[5] Section 101(a)(2) of the LMRDA provides in full:

"FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522, 29 U. S. C. § 411(a)(2).

[6] Several other claims under both Title I and Title IV of the LMRDA were asserted in the respondents' original complaint. These included allegations that the union failed to notify members about the nominations meeting, that the union unlawfully limited candidate eligibility to members who had timely paid their dues during the preceding 24 months, and that the union's disciplinary proceedings against respondent Lunnin were an unlawful reprisal for the exercise of rights guaranteed by the Act. A later amendment to the complaint added, *inter alia*, a claim that the union had increased dues several times since September 1976 without complying with the requirements set forth in § 101(a)(3) of the Act, 73 Stat. 522, 29 U. S. C. § 411(a)(3). For a variety of reasons, however, the District Court refused to grant preliminary relief on any of these claims, and they are not now before the Court.

After preliminary papers were filed, on December 12 the District Court issued a temporary restraining order to preserve the status quo and to protect its own jurisdiction. See App. 40–47. Given that the next morning (December 13) was the pre-established deadline for voting, many, if not most, of the ballots had already been returned by the union's voting members. Nonetheless, the court noted that federal-court jurisdiction was available under § 102 of Title I, 29 U. S. C. § 412, for claims alleging discriminatory application of union rules. Moreover, the court's order specifically required that the ballots be sealed and delivered to the court, thereby preventing the petitioners from counting the ballots until a final determination could be made on the motion for a preliminary injunction.

Several days of hearings on the preliminary injunction, and several months of negotiations concerning an appropriate court order to accompany that injunction, followed. Finally, on July 13, 1981, the District Court issued a preliminary injunction accompanied by a memorandum opinion. 521 F. Supp. 614 (1981). The court first addressed more fully the petitioners' argument that, because the challenged conduct concerned the procedures for conducting union elections, the respondents' exclusive remedy was to file a complaint with the Secretary of Labor under Title IV. The court rejected this argument, noting that, "at least with respect to actions challenging pre-election conduct, Title I of the LMRDA establishes an alternative enforcement mechanism for remedying conduct interfering with a member's right to engage in the activities associated with union democracy." *Id.*, at 621 (footnote omitted). Therefore, the court concluded, it could properly invoke its jurisdiction under Title I, if only for those claims concerning dues receipts and the nomination of respondent Lynch that are now before this Court. *Id.*, at 622–623. Because the suit concerned disputes arising out of a nominations meeting conducted in preparation for a union election, and given that the court had issued a temporary restraining order barring actual completion of the election, Title I jurisdiction could properly be asserted over this "pre-election conduct." *Id.*, at 621, n. 12.

After concluding that the respondents had demonstrated a substantial likelihood of success on their claims,[7] the court issued its comprehensive injunction.[8] The court explicitly intended to issue an order that "interfere[d] as little as possible with the nomination and election procedures" required by the union's constitution and bylaws, *id.*, at 634; moreover, the terms of the preliminary injunction were derived in large part from an ongoing process of negotiations and hearings that the court had conducted with the parties during the preceding six months. Nonetheless, the order declared the ballots cast in December 1980 to be "legally without effect," *id.*, at 636, n., and provided detailed procedures to be followed by the union during a new nominations meeting and a subsequent election. Among other things, the order selected an outside group of arbitrators to conduct and supervise the election, and set forth eligibility requirements for attending the nominations meeting, being a candidate for office, and voting. The order also provided that it would remain in effect until further order of the District Court.

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[7] In particular, the court found that the dues receipt requirement for entry into the nominations meeting was "suddenly announced," was applied "in a discriminatory fashion," and was "imposed in retaliation for [the respondents'] expressed intention to nominate candidates to oppose the incumbent Local officers and with the objective of suppressing dissent within the Local." 521 F. Supp., at 627. The court also found that, despite being listed as a candidate for union president, respondent Lynch had actually been nominated for secretary-treasurer. *Ibid.* Finally, the court found that irreparable harm to the respondents would result if a new nominations meeting and election were not held, that the burdens imposed on the petitioners by preliminary relief were sufficiently mitigated by the full hearing accorded their arguments, and that the public interest in union democracy would be served by granting such relief. *Id.*, at 627–628. None of these findings is being challenged before this Court. See n. 9, *infra.*

[8] The complete terms of the preliminary injunction are reported at the end of the District Court's decision, see 521 F. Supp., at 636–638, n., and as an appendix to the decision issued by the Court of Appeals, see 679 F. 2d 978, 1001–1004 (CA1 1982).

The petitioners appealed, and the Secretary of Labor, who until then had not participated in the proceedings, intervened on their behalf. They argued that the District Court lacked authority under Title I to enjoin the tabulation of ballots and order new nominations and elections under court supervision. The Court of Appeals rejected these arguments, however, and affirmed in all respects. 679 F. 2d 978 (CA1 1982). It agreed with the District Court that Title I remedies are not foreclosed when violations of Title I occur during the course of an election. The court also held that § 403 of the Act, which explicitly provides that Title IV's remedies are exclusive for elections that are "already conducted," 29 U. S. C. § 483, does not apply until all the ballots have actually been tabulated.[9]

Writing in dissent, Judge Campbell was "unable to read Title I as extending so far as to allow a district court, once balloting has commenced, to invalidate an election and order a new one under its supervision and under terms and conditions extemporized by the courts and parties." 679 F. 2d, at 1004. He believed that "the proper accommodation between Title I and Title IV requires consideration not only of the stage which the election process has reached but [also] the nature of the relief" requested and granted. *Id.*, at 1005.

Because of the confusion evident among the lower federal courts that have tried to reconcile the remedial provisions under Title I and Title IV of the Act,[10] we granted certiorari. 459 U. S. 1168 (1983). We now reverse.[11]

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[9] The Court of Appeals further concluded that "the district court committed no clear error" when finding that there existed substantial proof that the petitioners violated the provisions of Title I by imposing the dues receipt requirement and by mishandling the nomination of respondent Lynch. 679 F. 2d, at 995. See n. 7, *supra*. The petitioners have not challenged that ruling in this Court. Our decision therefore assumes that the respondents have demonstrated a substantial likelihood of success on their two Title I claims.

II

To examine fully the relationship between the respective enforcement provisions of Title I and Title IV of the

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[10] See, *e. g.*, *Kupau* v. *Yamamoto*, 622 F. 2d 449 (CA9 1980); *Driscoll* v. *International Union of Operating Engineers*, 484 F. 2d 682 (CA7 1973); *Schonfeld* v. *Penza*, 477 F. 2d 899 (CA2 1973); *McDonough* v. *Local 825, International Union of Operating Engineers*, 470 F. 2d 261 (CA3 1972). See also, *e. g.*, James, Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections, 13 Harv. Civ. Rights–Civ. Lib. L. Rev. 247 (1978); Comment, Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies, 42 U. Chi. L. Rev. 166 (1974); Note, Pre-election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V, 74 Colum. L. Rev. 1105 (1974).

[11] For two separate reasons, the respondents seek to have the writ of certiorari dismissed as improvidently granted or, in the alternative, the case dismissed because it no longer presents a live controversy. We decline, however, to follow either course.

First, the respondents claim that, by filing certain "stipulations" with the District Court, Local 82 effectively consented to the running of a new election, thereby foreclosing any challenge to that court's order requiring a new election. See, *e. g.*, App. 55 ("Local 82 is prepared to and will conduct a second nomination and mail ballot election for the election of officers under the following terms, provided the Court permits a change in the status quo preserved by its Order of December 12, 1980"). Neither the District Court nor the Court of Appeals, however, considered these conditional stipulations to be binding on Local 82. The District Court, for example, consistently recognized that, although agreeing to rerun the election under its own procedures, Local 82 had not waived its challenge to the authority or jurisdiction of the District Court to order a new election pursuant to court-imposed terms and conditions. See *id.*, at 110–112. And the Court of Appeals explicitly found that "these were not true factual stipulations narrowing the factual dispute but offers of settlement to which [Local 82] agreed to be bound, if [respondents] so agreed." 679 F. 2d, at 996, n. 22. We see no reason to disturb these conclusions.

Second, the respondents claim that the entire case is moot because not only has the election ordered by the District Court taken place, but also the

LMRDA, it is necessary first to summarize the relevant statutory provisions and Congress' principal purposes in their enactment. The LMRDA was "the product of congressional concern with widespread abuses of power by union leadership." *Finnegan* v. *Leu,* 456 U. S. 431, 435 (1982). Although the Act "had a history tracing back more than two decades," *ibid.*, and was directly generated by several years of congressional hearings, see S. Rep. No. 187, 86th Cong., 1st Sess., 2 (1959) (hereafter S. Rep. No. 187), many specific provisions did not find their way into the Act until the proposed legislation was fully considered on the floor of the Senate, 456 U. S., at 435, n. 4. It should not be surprising, therefore, that the interaction between various provisions that were finally included in the Act has generated considerable uncertainty.

A

Chief among the causes for this confusion is Title I of the Act, which provides union members with an exhaustive "Bill of Rights" enforceable in federal court. §§ 101–105, 29 U. S. C. §§ 411–415. In particular, Title I is designed to guarantee every union member equal rights to vote and otherwise participate in union decisions, freedom from unrea-

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term to be served by the officers chosen in that election has now elapsed. We have previously held, however, that the intervention of another election does not terminate the Secretary of Labor's authority under Title IV of the LMRDA to seek invalidation of the preceding election. *Wirtz* v. *Glass Bottle Blowers Assn.*, 389 U. S. 463 (1968); *Wirtz* v. *Laborers*, 389 U. S. 477 (1968). If the District Court acted beyond its authority in ordering and supervising a new election, then the ballots that were never counted in December 1980 but were sealed pursuant to the District Court's order could be tabulated, and the Secretary's remedies under Title IV would come into play. Moreover, we note that there are still pending several important collateral matters, including claims for damages, attorney's fees, and costs, that are dependent upon the propriety of the District Court's preliminary injunction. See Reply Brief for Petitioners 7–9. We have no doubt, therefore, that the present controversy has not been mooted by intervening circumstances.

sonable restrictions on speech and assembly, and protection from improper discipline. See *Finnegan* v. *Leu, supra,* at 435–436; *Steelworkers* v. *Sadlowski,* 457 U. S. 102, 109–110 (1982). Given these purposes, there can be no doubt that the protections afforded by Title I extend to union members while they participate in union elections. As we have previously noted:

> "Congress adopted the freedom of speech and assembly provision [§ 101(a)(2), 29 U. S. C. § 411(a)(2)] in order to promote union democracy. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership." *Sadlowski, supra,* at 112 (citations omitted).

As first introduced by Senator McClellan on the floor of the Senate, see 105 Cong. Rec. 6469–6476, 6492–6493 (1959), Title I empowered the Secretary of Labor to seek injunctions and other relief in federal district court to enforce the rights guaranteed to union members. A few days later, however, the McClellan amendment was replaced by a substitute amendment offered by Senator Kuchel. See *id.,* at 6693–6694, 6717–6727. Among the principal changes made by this substitute was to provide for enforcement of Title I through suits by individual union members in federal district court. *Id.,* at 6717, 6720.[12] As so amended, the legislation was endorsed in the Senate by a vote of 77–14, *id.*, at 6727, and was quickly accepted without substantive change by the House, see H. R. 8400, 86th Cong., 1st Sess., § 102 (1959); H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 31 (1959) (hereafter H. R. Conf. Rep. No. 1147). In relevant part, therefore, § 102 of the Act now provides:

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[12] Senator Kuchel explained that this was "one of the major changes in the proposal. The [McClellan] amendment . . . provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee

> "Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." 73 Stat. 523, 29 U. S. C. § 412.

Standing by itself, this jurisdictional provision suggests that individual union members may properly maintain a Title I suit whenever rights guaranteed by that Title have been violated.[13] At the same time, however, § 102 explicitly limits the relief that may be ordered by a district court to that which is "appropriate" to any given situation. See *Hall* v. *Cole*, 412 U. S. 1, 10–11 (1973).

B

Nor would it be appropriate to interpret the enforcement and remedial provisions of Title I in isolation. In particular,

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member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf." 105 Cong. Rec. 6720 (1959).

This aspect of the Kuchel amendment apparently received widespread support, not only from Senators who feared that the McClellan amendment's enforcement procedures would set a precedent for federal intervention in all civil rights matters, see, *e. g.*, *id.*, at 6696 (statement of Sen. Johnston), but also from Senators who wished to limit federal interference with the internal affairs of labor unions, see, *e. g.*, *id.*, at 6726 (statement of Sen. Kefauver). See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 859, 875 (1960).

[13] Allowance for actions under Title I is only narrowly circumscribed by procedural requirements such as exhaustion. Compare § 101(a)(4), 29 U. S. C. § 411(a)(4), with *NLRB* v. *Marine Workers*, 391 U. S. 418, 426–428 (1968).

Title IV of the LMRDA specifically regulates the conduct of elections for union officers, and therefore protects many of the same rights as does Title I. See §§ 401–403, 29 U. S. C. §§ 481–483. Title IV "sets up a statutory scheme governing the election of union officers, fixing the terms during which they hold office, requiring that elections be by secret ballot, regulating the handling of campaign literature, requiring a reasonable opportunity for the nomination of candidates, authorizing unions to fix 'reasonable qualifications uniformly imposed' for candidates, and attempting to guarantee fair union elections in which all the members are allowed to participate." *Calhoon* v. *Harvey*, 379 U. S. 134, 140 (1964).[14] In general terms, "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections," *Wirtz* v. *Glass Bottle Blowers Assn.*, 389 U. S. 463, 470 (1968), an interest "vital" not only to union members but also to the general public, *id.*, at 475. See *Wirtz* v. *Laborers*, 389 U. S. 477, 483 (1968).

Although Congress meant to further this basic policy with a minimum of interference in the internal affairs of unions, see *Calhoon, supra,* at 140, § 402 of Title IV contains its own comprehensive administrative and judicial procedure for enforcing the standards established in that Title of the Act, 29 U. S. C. § 482. See *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975); *Trbovich* v. *Mine Workers*, 404 U. S. 528, 531 (1972); *Calhoon, supra,* at 138–140. "Any union member who alleges a violation [of Title IV] may initiate the enforcement procedure. He must first exhaust any internal remedies available under the constitution and bylaws of his union. Then he may file a complaint with the Secretary of Labor, who 'shall investigate' the complaint. Finally, if the Secretary finds probable cause to believe a violation has occurred, he 'shall . . . bring a civil action against the labor organization' in federal district court, to set aside the election if it has already been held, and to direct and supervise a new election." *Trbovich*, *supra*, at 531 (quoting § 402, 29 U. S. C. § 482). See *Calhoon*, *supra*, at 140. Significantly, the court may invalidate an election already held, and order the Secretary to supervise a new election, only if the violation of Title IV "may have affected the outcome" of the previous election. § 402(c), 29 U. S. C. § 482(c).

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[14] The Secretary of Labor, who has primary responsibility for the enforcement of Title IV, has summarized the requirements of that Title in 29 CFR § 452.1 (1983). See generally 29 CFR pt. 452 (1983).

Congress also included in Title IV an exclusivity provision that explains the relationship between the enforcement procedures established for violations of Title IV and the remedies available for violations of potentially overlapping state and federal laws. In relevant part, § 403 of the LMRDA provides:

> "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive." 73 Stat. 534, 29 U. S. C. § 483.

Relying on this provision, and on the comprehensive nature of the enforcement scheme established by § 402, we have held that Title IV "sets up an exclusive method for protecting Title IV rights," and that Congress "decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV." *Calhoon*, *supra*, at 140.[15]

III

We have not previously determined exactly how the exclusivity of Title IV's remedial scheme for enforcing rights guaranteed by that Title might affect remedies available to enforce other rights, such as those protected by Title I. Nor has Congress provided any definitive answers in this area. This case requires, however, that we decide whether Title I remedies are available to aggrieved union members while a union election is being conducted.

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[15] An exception to this general rule is provided in § 401(c) of the Act for enforcing a candidate's right to distribution of campaign literature and equal access to membership lists. 29 U. S. C. § 481(c). See 379 U. S., at 140, n. 13.

A

It is useful to begin by noting what the plain language of the Act clearly establishes about the relationship between the remedies provided under Title I and Title IV. First, the exclusivity provision included in § 403 of Title IV plainly bars Title I relief when an individual union member challenges the validity of an election that has already been completed.[16] Second, the full panoply of Title I rights is available to individual union members "prior to the conduct" of a union election. As with the plain language of most federal labor laws, however, this simplicity is more apparent than real. Indeed, by its own terms, the provision offers no obvious solution to what remedies are available during the course of a union election, the issue presented by this case.

Even if the plain meaning of the "already conducted" language of § 403 could be read not to preclude other remedies until the actual tabulation and certification of ballots have been completed, we would hesitate to find such an interpretation determinative. First, such an approach would ignore the limitation on judicial remedies that Congress included in Title I, which allows a district court to award only "appropriate" relief. Moreover, we have previously "cautioned against a literal reading" of the LMRDA. *Wirtz* v. *Glass Bottle Blowers Assn.*, *supra*, at 468. Like much federal labor legislation, the statute was "the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Ibid.* (citing *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 619 (1967)). See *Sadlowski*, 457 U. S., at 111. Indeed, in many ways this admonition applies with its greatest force to the interaction between Title I and Title IV of the LMRDA, if only because of the unusual way in which the legislation was enacted.[17]

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[16] This does not necessarily mean that § 403 forecloses the availability of all postelection relief under Title I. The exclusivity provision of Title IV may not bar postelection relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted. See, *e. g.*, *Ross* v. *International Brotherhood of Electrical Workers*, 513 F. 2d 840 (CA9 1975) (common-law tort claim); *Amalgamated Clothing Workers Rank and File Committee* v. *Amalgamated Clothing Workers of America, Philadelphia, Joint Board*, 473 F. 2d 1303 (CA3 1973) (Title I claim).

Nor does the legislative history of the LMRDA provide any definitive indication of how Congress intended § 403 to apply to Title I suits while an election is being conducted. Throughout the legislative debate on this provision, the exclusivity of Title IV was predominantly, if not only, considered in the context of a union election, such as one held at a union meeting, that would take place for a discrete and limited period of time.[18] Thus, Congress did not explicitly consider how the exclusivity provision might apply to an election that takes several weeks or months to complete. Moreover, the legislative history that is available on the meaning of § 403 is largely derived from congressional action that occurred prior to the time that Title I was added to the LMRDA. See, *e. g.*, S. Rep. No. 187, at 21; *id.*, at 104 (minority views); H. R. Rep. No. 741, 86th Cong., 1st Sess., 17 (1959). The interplay between the rights and remedies provided to union members by Title I, and the exclusivity provision already included in Title IV, therefore received little, if any, attention from the Congress. Cf. H. R. Conf. Rep. No. 1147, at 35 (Conference Report, written after both Titles were included in the Act, but failing to explain what remedies are available during an election).

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[17] The remarks of a commentator who actively participated in shaping much of the LMRDA are especially pertinent:

"The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960).

See *Sadlowski*, 457 U. S., at 111; *Glass Bottle Blowers Assn.*, 389 U. S., at 468, n. 6.

[18] For example, speaking before Title I was added to the LMRDA, at which time state law provided the principal protection for union members before an election, Senator John F. Kennedy noted: "Prior to the day of an election an individual can sue in a State. The day after an election the Secretary of Labor assumes jurisdiction." 105 Cong. Rec. 6485 (1959).

B

Despite this absence of conclusive evidence in the legislative history, the primary objectives that controlled congressional enactment of the LMRDA provide important guidance for our consideration of the availability of Title I remedies during a union election. In particular, throughout the congressional discussions preceding enactment of both Title I and Title IV, Congress clearly indicated its intent to consolidate challenges to union elections with the Secretary of Labor, and to have the Secretary supervise any new elections necessitated by violations of the Act. This strongly suggests that, even when Title I violations are properly alleged and proved, Congress would not have considered a court order requiring and judicially supervising a new election to be "appropriate" relief under Title I. At the same time, there is nothing in the legislative history suggesting that Congress intended to foreclose all access to federal courts under Title I during an election, especially when a statutory violation could be corrected without any major delay or disruption to an ongoing election. We therefore conclude that whether a Title I suit may properly be maintained by individual union members during the course of a union election depends upon the nature of the relief sought by the Title I claimants.

Throughout its consideration of the LMRDA, Congress clearly intended to lodge exclusive responsibility for post-election suits challenging the validity of a union election with the Secretary of Labor. The legislative history of Title IV consistently echoes this theme. For example, the election provisions contained in the Committee bill as originally reported to the full Senate gave the Secretary exclusive authority to enforce Title IV and to supervise whatever new elections might be needed because of violations of its provisions. S. 1555, 86th Cong., 1st Sess., §§ 302–303 (1959). As the Report of the Senate Committee on Labor and Public Welfare explained: "[S]ince the bill provides an effective and expeditious remedy for overthrowing an improperly held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded." S. Rep. No. 187, at 21.[19] The bill that was finally passed by the Senate retained these procedures for violations of Title IV.

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[19] A major reason for creating federal standards to govern union elections, and for lodging primary responsibility for enforcement of those standards with the Secretary of Labor, was the inadequacy of state-court remedies. Professor Archibald Cox, testifying before the Senate Subcommittee on Labor, explained in detail the inherent inability of courts to supervise elections:

"A court is also a clumsy instrument for supervising an election. The judicial process may be suitable for determining the validity of an election which has already been held; but if it is found invalid, or if no election has been held, judges have few facilities for providing an effective remedy. Merely to order an election might turn the authority to conduct the balloting over to the very same officers whose misconduct gave rise to the litigation. The court has no tellers, watchers, or similar officials. It would become mired in the details of the electoral process. To appoint a master to supervise the election would delegate the responsibility, but the master would face many of the same problems as the judge. Probably it is the consciousness of these weaknesses that has made judges so reluctant to interfere with union elections, though apparently a few court-conducted elections have been held." Labor-Management Reform Legislation: Hearings on S. 505 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess., 133–134 (1959) (hereinafter Hearings).

In the House, three separate bills were introduced, with all three containing substantially similar enforcement procedures for violations of Title IV. Unlike the Senate bill, the House bills permitted an aggrieved union member to file suit in federal district court to enforce his Title IV rights. See, *e. g.*, H. R. 8400, 86th Cong., 1st Sess., § 402 (1959) (Landrum-Griffin bill). Significantly, however, even these bills provided that the Secretary of Labor would supervise any new elections ordered by the court. See, *e. g.*, H. R. Rep. No. 741, *supra*, at 17 (if district court finds relevant statutory violation, the court should "declare the election, if any, to be void, and direct the conduct of a new election under the supervision of the Secretary of Labor"). Thus, even before the Conference Committee adopted the Title IV enforcement procedures included in the Senate bill, see H. R. Conf. Rep. No. 1147, at 35, both Houses of Congress had consistently indicated their intent to have the Secretary of Labor supervise any new union elections necessitated by the Act.[20]

Moreover, nothing in the flurry of activity that surrounded enactment of Title I, see *supra*, at 537–538, and n. 12, indicates that Congress intended that Title to reverse this consistent opposition to court supervision of union elections. Although the enactment of Title I offered additional protection to union members, including the establishment of various statutory safeguards effective during the course of a union election, there is no direct evidence to suggest that Congress believed that enforcement of Title I would either require or allow courts to pre-empt the expertise of the Secretary and supervise their own elections. In the absence of such legislative history, and given the clear congressional preference expressed in Title IV for supervision of new elections by the Secretary of Labor, we are compelled to conclude that Congress did not consider court supervision of union elections to be an "appropriate" remedy for a Title I suit filed during the course of a union election. § 102, 29 U. S. C. § 412.

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[20] This view is confirmed by the elaborate procedures eventually included in Title IV to ensure that the Secretary supervises any new elections and to minimize any other outside interference in union elections. See, *e. g.*, 29 U. S. C. § 482(a) (requiring exhaustion of internal remedies before member may file complaint with the Secretary; also providing that challenged elections shall be presumed valid pending final decision on Title IV violation); § 482(c) (requiring that any new elections be conducted under the Secretary's supervision).

That is not to say that a court has no jurisdiction over otherwise proper Title I claims that are filed during the course of a lengthy union election. The important congressional policies underlying enactment of Title I, see *supra*, at 536–537, likewise compel us to conclude that appropriate relief under Title I may be awarded by a court while an election is being conducted. Individual union members may properly allege violations of Title I that are easily remediable under that Title without substantially delaying or invalidating an ongoing election. For example, union members might claim that they did not receive election ballots distributed by the union because of their opposition to the incumbent officers running for reelection. Assuming that such union members prove a statutory violation under Title I, a court might appropriately order the union to forward ballots to the claimants before completion of the election. To foreclose a court from ordering such Title I remedies during an election would not only be inefficient, but would also frustrate the purposes that Congress sought to serve by including Title I in the LMRDA. Indeed, eliminating all Title I relief in this context might preclude aggrieved union members from ever obtaining relief for statutory violations, since the more drastic remedies under Title IV are ultimately dependent upon a showing that a violation "may have affected the outcome" of the election, § 402(c), 29 U. S. C. § 482(c).[21]

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[21] Again, Professor Cox' testimony before the Senate Subcommittee on Labor suggested a similar analysis. Although he was speaking before Title I was added to the Senate bill, Professor Cox objected to a broad exclusivity provision, see S. 505, 86th Cong., 1st Sess., § 303 (1959) ("The

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Our conclusion that appropriate Title I relief during the course of a union election does not include the invalidation of

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duties imposed and the rights and remedies provided by this title shall be exclusive"), that would have pre-empted all state law concerning union elections:

"[T]he provision exclude[s] suits in the State courts challenging the validity of union elections. An election is an integer. Its validity should be adjudicated once and for all in one forum. To permit State court actions would open the way to unnecessary harassment of the union on one side and to friendly suits aimed at foreclosing the Secretary's action on the other.

"I still believe that these purposes deserve to be accomplished but I have been persuaded that the language used in [S. 505] to accomplish them [is] much too broad. In a few States, actions have been successfully maintained in advance of a union election to compel the officers to comply with provisions of the constitution and bylaws such as putting a candidate's name on the ballot, permitting a classification of members to vote, or giving adequate notice of the elections. These remedies are often more effective than a challenge to the validity of an election after it has been held. They present the evil before it is accomplished. It is not impossible that other State courts will find it possible to give similar relief enforcing the union constitution and bylaws in advance of the election. Such proceedings would not interfere with the Federal policy because they do no more than compel the union officers to comply with the rules voluntarily adopted by the members.

"It may also become necessary for an individual member to resort to the courts to secure redress against his expulsion from the union or against other discipline imposed upon him because he dared to assert his rights in connection with an election. To enact that the provisions of the . . . bill should exclude all other rights and remedies might interfere with the bringing of such an action even though the Federal law gave no relief.

"I am not contending that [the exclusivity provision] would be held to exclude the last two forms of State intervention. I would hope that the Supreme Court would confine [the] section . . . to substantive State regulation and Federal or State actions challenging the validity of an election already conducted." Hearings, at 135.

In light of these suggestions, Professor Cox proposed amending the exclusivity provision so that it would not affect "the right of any member of a labor union to maintain an action to compel the observance of the constitution and bylaws of a labor organization in a forthcoming election of an ongoing election or court supervision of a new election finds further support in our prior cases interpreting the LMRDA, and in the underlying policies of the Act that have controlled those decisions. In *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), for example, we were faced with a pre-election challenge to several union rules that controlled eligibility to run and nominate others for union office. The claimants in that case asked the court to enjoin the union from preparing for or conducting any election until the rules were revised. We first concluded that in substance the claims alleged violations of Title IV rather than Title I, because the latter only protects union members against the discriminatory application of union rules. Then, given that "Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV," *id.*, at 140; see *supra*, at 540, we held that the District Court could not invoke its jurisdiction under Title I to hear Title IV claims. We relied for our conclusion in part on Congress' intent "to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." 379 U. S., at 140. See also *ibid.* ("It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest").

In several subsequent decisions, we also relied on the important role played by the Secretary in enforcing Title IV

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officers, to challenge his expulsion or the imposition of other discipline, *or to assert any right of individual membership other than to challenge the validity of an election.*" *Id.*, at 136 (emphasis added). Although Professor Cox apparently assumed that union elections would occur during a discrete period of time, we believe that his analysis is consistent with the approach to Title I remedies available during a union election that we adopt today. Indeed, the broad exclusivity provision to which he was objecting was removed by the Senate Subcommittee and replaced with the language that now appears in § 403, 29 U. S. C. § 483.

violations and in supervising new union elections. See, *e. g.*, *Wirtz* v. *Glass Bottle Blowers Assn.*, 389 U. S., at 473–475; *Wirtz* v. *Laborers*, 389 U. S., at 482–484; *Wirtz* v. *Hotel Employees*, 391 U. S. 492 (1968). At the same time, we noted that another primary goal of Congress was to maximize the "'amount of independence and self-government'" granted to unions. See *Glass Bottle Blowers Assn.*, *supra*, at 472–473 (quoting S. Rep. No. 187, at 21); *Hodgson* v. *Steelworkers*, 403 U. S. 333 (1971). As we more fully explained in *Trbovich* v. *Mine Workers*, 404 U. S. 528 (1972), Congress made suit by the Secretary under Title IV the exclusive postelection remedy for challenges to an election "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." *Id.*, at 532. Thus, exclusive postelection enforcement by the Secretary serves "as a device for eliminating frivolous complaints and consolidating meritorious ones." *Id.*, at 535.

Consistent with these policies, *Trbovich* cited *Calhoon*, *supra*, at 140, for the proposition that "§ 403 prohibits union members from initiating a private suit to set aside an election." 404 U. S., at 531. Although this somewhat overstated our holding in *Calhoon*, which was limited to the exclusivity of postelection suits by the Secretary for violations of Title IV, we believe that the policies supporting Congress' decision to consolidate Title IV suits with the Secretary are equally applicable to Title I suits that seek to "set aside an election."[22] Although the important protections

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[22] Most recently, in *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975), we held that a decision by the Secretary not to pursue court action under Title IV is subject to limited review in the district court. At the same time, we reaffirmed the Secretary's exclusive authority to challenge and, if successful, to supervise union elections. *Id.*, at 568–571.

We also note that, in a paragraph summarizing remedies under the LMRDA, our opinion in *Bachowski* briefly touched upon the interplay between the enforcement provisions under Title I and Title IV: "Certain provided to union members by Title I should not easily be precluded, the equally strong policies vesting the Secretary with exclusive supervisory authority over new union elections require that Title I remedies during the course of an election be limited to this extent.

In sum, whether suits alleging violations of Title I of the LMRDA may properly be maintained during the course of a union election depends upon the appropriateness of the remedy required to eliminate the claimed statutory violation. If the remedy sought is invalidation of the election already being conducted with court supervision of a new election, then union members must utilize the remedies provided by Title IV. For less intrusive remedies sought during an election, however, a district court retains authority to order appropriate relief under Title I.

IV

The procedural history of this case clearly demonstrates the undesirable consequences that follow from judicial supervision of a union election. The respondents filed suit after Local 82 had distributed election ballots to its members, but before some of the ballots had been returned or any of the ballots had been counted. Then, less than 24 hours before the election would have been completed and the ballots tabulated, the District Court issued a temporary restraining order that brought the election to a halt. This was followed by several months of negotiations between the parties and hearings before the District Court. Finally, the court issued

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LMRDA provisions concerning pre-election conduct, 29 U. S. C. §§ 411–413 and 481(c), are enforceable in suits brought by individual union members. *Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U. S. C. § 482.* Section 483 is thus not a prohibition against judicial review but simply underscores the exclusivity of the § 482 procedures in post-election cases." *Id.*, at 566–567 (emphasis added). To the extent that our decision today holds that district courts may award certain Title I relief during the course of a union election, that holding prevails over any inconsistency with the italicized sentence.

an order declaring the interrupted election invalid, and setting forth elaborate procedures to be followed during a new election.

Several aspects of these proceedings demonstrate why they are inconsistent with the policies underlying the LMRDA. For example, the temporary restraining order and preliminary injunction issued by the court delayed the union election that was originally scheduled for December 1980 for one full year. Among other consequences, this left the incumbent union officers in power beyond the scheduled expiration of their terms. Cf. § 401(b), 29 U. S. C. § 481(b) (officers shall be elected not less than once every three years). If the procedures under Title IV had been properly followed, the December 1980 election would have been presumed valid, see § 402(a), 29 U. S. C. § 482(a), and new officers would have replaced the incumbents. Moreover, the expertise of the Secretary in supervising elections was completely ignored. Not only did the court acting alone decide that a new election was required, but its order established procedures for that election and appointed outside arbitrators to supervise their implementation. This action by the District Court directly interfered with the Secretary's exclusive responsibilities for supervising new elections, and was inconsistent with the basic objectives of the LMRDA enforcement scheme.

V

We conclude that the District Court overstepped the bounds of "appropriate" relief under Title I of the LMRDA when it enjoined an ongoing union election and ordered that a new election be held pursuant to court-ordered procedures. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[23]

It is so ordered.

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[23] On remand, the preliminary injunction issued by the District Court should be vacated, and the ballots from the December 1980 election that

JUSTICE STEVENS, dissenting.

In the course of an election, Local 82 violated a number of the rights of respondent union members secured by Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 522, 29 U. S. C. § 401 *et seq.* Specifically, Local 82 restricted respondents' ability to nominate candidates of their choice for union office in violation of § 101(a)(1) of the Act, 29 U. S. C. § 411(a)(1), and prevented respondents from freely expressing their views at a union nominations meeting in violation of § 101(a)(2) of the Act, 29 U. S. C. § 411(a)(2). After the suit was filed, the union indicated that it was willing to rerun the election which had been conducted subsequent to the tainted nominations meeting. The District Court preliminarily enjoined the union to do exactly that, exercising its authority under § 102 of the Act, which provides in pertinent part: "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States *for such relief (including injunctions) as may be appropriate.*" 29 U. S. C. § 412 (emphasis supplied).

Today the Court agrees that respondents have established violations of Title I, and that the District Court had jurisdiction to fashion a remedy under § 102. However, the Court reverses the issuance of the preliminary injunction, holding that it did not constitute "appropriate relief" within the meaning of § 102. The Court so holds not because of anything in § 102 or its legislative history, but rather because of a provision in Title IV of the Act which was written long before § 102 was added to the LMRDA, and which was designed to

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were sealed and delivered to the court should be returned to the custody of the petitioners. After those ballots have been counted, and the election completed, the respondents will have access to the remedies available under Title IV. We note that the Solicitor General has represented to this Court that "the Secretary would himself have sought a new election for a nominations violation like the one alleged here." Brief for Federal Respondent 11; Tr. of Oral Arg. 27.

limit the remedies available in state courts, rather than the remedy a federal court may provide for a violation of Title I.

It must be conceded that there is an inconsistency between Titles I and IV of the LMRDA. While § 102 in Title I grants district courts seemingly unqualified power to grant "such relief (including injunctions), as may be appropriate," § 403 of Title IV provides: "The remedy provided by this title for challenging an election already conducted shall be exclusive." 73 Stat. 534, 29 U. S. C. § 483. As the Court points out, the legislative history contains nothing that directly addresses this apparent inconsistency. *Ante*, at 542–543. I agree with the Court that the question presented by this case can be answered only by reference to the underlying purposes of the Act. *Ante*, at 541–542. However, I do not agree that those purposes support today's holding.

Title I was "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution," *Finnegan* v. *Leu*, 456 U. S. 431, 435 (1982). By securing these rights, Congress hoped to ensure unions would function in a more democratic manner.[1] We have previously construed § 102 of Title I to have a broad sweep, consistent with its broad remedial purposes. In *Hall* v. *Cole*, 412 U. S. 1 (1973), we wrote: "§ 102 was intended to afford the courts 'a wide latitude to grant relief according to the necessities of the case,' and 'to give such relief as [the court] deems equitable under all the circumstances.'" *Id.*, at 13 (footnotes omitted) (quoting 105 Cong. Rec. 15548 (1959) (remarks of Rep. Elliott), and *id.*, at 6717 (remarks of Sen. Kuchel)). Employing this broad construction of the power conferred by § 102, we then held that an award of attorney's fees was consistent with the statute.[2]

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[1] See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 112 (1982); *Finnegan*, 456 U. S., at 435–436; *Hall* v. *Cole*, 412 U. S. 1, 7–8 (1973); *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 497–498 (1968).

[2] "[Section] 102 of the LMRDA broadly authorizes the courts to grant 'such relief (including injunctions) as may be appropriate.' 29 U. S. C. § 412. Thus, § 102 does not 'meticulously detail the remedies available to a

The Court concedes that § 102 authorizes the issuance of limited injunctions that would not substantially delay or invalidate an election, *ante*, at 546. The anomaly that results is that only the most serious violations of Title I go unremedied as a result of today's holding. It is only when a violation takes place in the midst of an election, produces the kind of irreparable injury that only an injunction can remedy, and is of a magnitude such that it taints the entire election and the results thereof, that the Court's holding precludes a remedy. Such an approach is plainly inconsistent with the fundamental purposes of Title I.

There is no instance in which Title I rights are of greater importance, and hence the need for their effective vindication a more compelling necessity, than in the midst of an election. We wrote in *Hall* that "Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union." 412 U. S., at 14. The reason for this is clear enough:

> "Congress adopted the freedom of speech and assembly provision in order to promote union democracy. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of [union] election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership." *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 112 (1982) (citations omitted).

By ensuring that Title I violations which go to the heart of the electoral process will not be effectively remedied, the majority seriously undermines the core purpose of Title I.

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plaintiff,' and we cannot fairly infer from the language . . . an intent to deny to the courts the traditional equitable power to grant counsel fees in 'appropriate' situations." 412 U. S., at 10.

The underlying purposes of § 403, in contrast, provide no justification for limiting the relief available under § 102. Section 403 was written before Title I was added to the LMRDA on the floor of the Senate. Thus, as the majority acknowledges *ante*, at 542–543, there is little in Title IV's history or purpose to suggest that it was directed at limiting the relief available under Title I. At the time § 403 was drafted and discussed, its only effect was to limit the ability of *state* courts to invalidate union elections; that is certainly the only purpose or policy identified in the legislative history. For example, the Senate Report states:

> "Section [4]03 of the bill specifically preserves rights and remedies which union members have under existing law to insure compliance with provisions of a union's constitution and bylaws relating to elections prior to the conduct of an election. However, since the bill provides an effective and expeditious remedy for overthrowing an improperly held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded." S. Rep. No. 187, 86th Cong., 1st Sess., 21 (1959).[3]

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[3] The other relevant statements in the legislative history concerning § 403 also focus on its pre-emptive effect with respect to state courts, see 105 Cong. Rec. 14274 (analysis of the U. S. Chamber of Commerce); *id.*, at 7632 (remarks of Sen. Goldwater); S. Rep. No. 187, 86th Cong., 1st Sess., 101 (1959) (minority views); S. Rep. No. 1684, 85th Cong., 2d Sess., 12–15 (1958) (report on predecessor version of the LMRDA). The majority concludes that § 403 represents a congressional recognition that judicial intervention through suits brought by private litigants is an inappropriate way to remedy unfair elections, but the only legislative history cited by the majority in support of that conclusion is the testimony of Professor Cox, and even he refers only to pre-emption of suits in state courts. See *ante*, at 546–548, n. 21. See also *ante*, at 542, n. 19. The version of the LMRDA passed by the House provides little support for the Court's position that Congress was opposed to private suits to overturn union elections, since not only did the House version contain a Title I which was enforced by private suits, but also under that version Title IV itself was enforced by private suits which could result in the overturning of an election. See

In fact, this Court has previously acknowledged this very point: "The debates reflect great concern with the proper relationship between state and federal remedies, and much less concern with the relationship between private and public enforcement." *Trbovich* v. *Mine Workers*, 404 U. S. 528, 534, n. 6 (1972). Thus, the policies underlying § 403 are a slender reed on which to support today's holding.

Moreover, what limited relevance the original intent and purpose of Title IV has is undermined by the subsequent addition of Title I on the floor of the Senate. The precise reason Title I was added to the LMRDA was because Congress concluded that Title IV did not go far enough in protecting the rights of individual union members.[4] In particular, Congress added § 102 because it felt that these rights had to be enforced through a private right of action. *Finnegan*, 456 U. S., at 440, n. 10.

The original version of Title I, offered as an amendment to the LMRDA by Senator McClellan, provided that the rights contained therein would be enforced through suits brought by the Secretary of Labor. See 105 Cong. Rec. 6469–6492 (1959). The amendment passed only narrowly, with the Vice President casting the tie-breaking vote. See *id.*, at 6493. One of the arguments made against this version of Title I by a number of Senators was that the rights it created were indi-

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H. R. 8342, §§ 101–102, 402, 86th Cong., 1st Sess. (1959), reprinted in 105 Cong. Rec. 15884, 15887 (1959). See also H. R. Rep. No. 741, 86th Cong., 1st Sess., 16–17 (1959) ("A member of a labor organization who is aggrieved by any violation of these provisions . . . may bring a civil action against such labor organization in the U. S. district court for the district in which the principal office of such labor organization is located. Such action may be for the purpose of preventing and restraining such violation and for such other relief as may be appropriate, including the holding of a new election under the supervision of the Secretary of Labor and in accordance with this title").

[4] See *Sadlowski*, 457 U. S., at 109; 105 Cong. Rec. 6470–6474 (1959) (remarks of Sen. McClellan); *id.*, at 6476–6478; *id.*, at 6488 (remarks of Sens. Allott and Goldwater); *id.*, at 6490 (remarks of Sen. Dirksen).

vidual in nature and should be enforced through a private right of action rather than by the Secretary of Labor.[5]

Three days later, Senator Kuchel offered a compromise version of Title I. He explained:

> "[I]n several major points the McClellan amendment would be changed by our amendment. In one case our amendment provides for deleting from the McClellan amendment the provision for the right of the Secretary of Labor to seek an injunction when any of the rights enumerated are alleged to have been violated. In such circumstances, our amendment gives a union member who alleges such a grievance the right to go into the Federal court for appropriate relief." *Id.*, at 6717.

This change resulted from dissatisfaction with leaving Title I rights in the hands of the Secretary of Labor. Senator Kuchel explained:

> "[H]ere is one of the major changes in the proposal. The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf." *Id.*, at 6720.

Senator Kefauver congratulated Senator Kuchel on removing the Secretary of Labor from "the middle of the actions of every labor union in the United States," *id.*, at 6726, and Senator Clark noted that the new version of Title I "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by courts," *id.*, at 6721. Senator Curtis said that according the individual union member a private right of action "represents the finest means by which his rights may be protected." *Id.*, at 6723. There are numerous other statements in the legislative history to similiar effect.[6] Thus, whatever may have been its belief when Title IV was originally drafted, the legislative history of Title I demonstrates that Congress rejected reliance on the Secretary of Labor to vindicate Title I rights. Yet that is the precise effect of today's holding—in those cases where the seriousness of the violation and the irreparability of the remedy would justify an injunction overturning the results of an election, the Court has decreed that union members' ability to obtain a remedy for violations of their Title I rights is left to the discretion of the Secretary, a result at odds with the fundamental reason § 102 was added to the statute.[7]

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[5] See *id.*, at 6696 (remarks of Sen. Johnston); *id.*, at 6486 (remarks of Sen. Kennedy); *id.*, at 6485 (remarks of Sen. Morse); *id.*, at 6483 (remarks of Sen. Kennedy).

Calhoon v. *Harvey*, 379 U. S. 134 (1964), the case on which the majority principally relies, does not require the Court to adopt its parsimonious construction of § 102. In *Calhoon*, the Court began its analysis with a simple proposition: "Jurisdiction of the District Court under § 102 of Title I depends entirely upon whether this complaint showed a violation of rights guaranteed by § 101(a)(1)," *id.*, at 138. In stating its holding, the Court never mentioned § 403, much less hold that it limited the scope of relief available under § 102. The Court simply held that the complaint in that case did not fall under § 102 because it challenged the eligibility requirements for union office, and "Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials," *ibid.* In this case, since the Court concedes that respondents established the probable existence of violations of § 101, it follows that under *Calhoon* there is jurisdiction to issue an "appropriate" remedy for those violations.[8]

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[6] See *id.*, at 15836 (remarks of Rep. McCormack); *id.*, at 15689 (remarks of Rep. O'Hara); *id.*, at 15670–15671 (remarks of Rep. Loser); *id.*, at 15564–15565 (analysis of Rep. Foley); *id.*, at 14989 (remarks of Sen. Morse); *id.*, at 14345 (remarks of Rep. Landrum); *id.*, at 10902–10903 (remarks of Sen. McClellan); *id.*, at 7023 (section-by-section analysis).

[7] See generally *Calhoon* v. *Harvey*, 379 U. S. 134, 144–145 (1964) (Stewart, J., concurring). As I have previously observed, this result leaves the individual union member's statutory rights subject to the Secretary of Labor's willingness to proceed against what may be an entrenched and politically powerful union leadership. See *Hodgson* v. *Lodge 851, International Assn. of Machinists & Aerospace Workers, AFL–CIO*, 454 F. 2d 545, 564 (CA7 1971) (dissenting opinion).

In sum, the Court's conclusion that § 403 is a limitation on the power granted district courts in § 102 turns the statute and its legislative history on their head. The majority reads the statute as if Title IV had been added to the statute to limit the scope of Title I, when in reality the reverse is true. Congress wanted union members to be able to protect their own Title I rights rather than to rely on the Secretary of Labor. Because the Court's holding means that the most serious violations of Title I cannot be adequately remedied except in the discretion of the Secretary, I cannot join the Court's holding or judgment.

I recognize that in practice the question whether a new election is an appropriate remedy will not be free from difficulty. In shaping a remedy, the exercise of the district court's discretion should be informed by the national labor policies discussed by the Court *ante,* at 544, n. 19, 548–549:

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[8] The majority itself explains why two of our other cases are not controlling. Statements in *Dunlop* v. *Bachowski,* 421 U. S. 560, 566–567 (1975), concerning the pre-emptive effect of § 403 are correctly characterized by the majority as dicta which the majority itself repudiates as too broad. *Ante,* at 549–550, n. 22. Similarly, the Court recognizes that *Trbovich*'s citation of *Calhoon* as standing for the proposition that "§ 403 prohibits union members from initiating a private suit to set aside an election," 404 U. S., at 531, was an overstatement of the holding of *Calhoon. Ante,* at 549. Moreover, *Trbovich,* like *Calhoon* and *Bachowski,* involved claims properly brought under Title IV; no issue concerning the scope of § 102 was presented.

courts should be wary of unjustified or excessive interference in union elections and of the difficulties inherent in supervising an election; they should also accord due deference to the views of the Secretary of Labor.[9] However, it is unnecessary to confront any question concerning the meaning of "appropriate" relief in this case, for two reasons. First, petitioners themselves do not press the point. The questions presented in their petition for certiorari, and the thrust of their briefs, are that § 403 precluded the District Court from acting as it did. Petitioners do not argue that the District Court abused its discretion even if § 403 were not applicable here. Second, in large part petitioners stipulated to the appropriateness of the relief in the District Court, by filing stipulations indicating that they were willing to rerun the allegedly tainted election. See 521 F. Supp. 614, 618, 623 (Mass. 1981); App. 55–60, 108–110. I agree with the Court of Appeals that since the relief the District Court ultimately issued was substantially similar to what petitioners had indicated they were willing to do anyway, Judge Keeton did not abuse his discretion in fashioning a remedy. See 679 F. 2d 978, 996–999 (CA1 1982).

Accordingly, I do not believe that the District Court failed to fashion "appropriate" relief or otherwise abused its discretion. I respectfully dissent.

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[9] Under Federal Rule of Civil Procedure 24(b), the Secretary of Labor can intervene in Title I litigation, as he has in this case. Cf. *Trbovich*, 404 U. S., at 536–539 (union members may intervene in Title IV actions brought by the Secretary).

FIREFIGHTERS LOCAL UNION NO. 1784 *v.* STOTTS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-206. Argued December 6, 1983—Decided June 12, 1984*

Respondent Stotts, a black member of petitioner Memphis, Tenn., Fire Department, filed a class action in Federal District Court charging that the Department and certain city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. This action was consolidated with an action filed by respondent Jones, also a black member of the Department, who claimed that he had been denied a promotion because of his race. Thereafter, a consent decree was entered with the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. Subsequently, when the city announced that projected budget deficits required a reduction of city employees, the District Court entered an order preliminarily enjoining the Department from following its seniority system in determining who would be laid off as a result of the budgetary shortfall, since the proposed layoffs would have a racially discriminatory effect and the seniority system was not a bona fide one. A modified layoff plan, aimed at protecting black employees so as to comply with the court's order, was then presented and approved, and layoffs pursuant to this plan were carried out. This resulted in white employees with more seniority than black employees being laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. The Court of Appeals affirmed, holding that although the District Court was wrong in holding that the seniority system was not bona fide, it had acted properly in modifying the consent decree.

Held:

1. These cases are not rendered moot by the facts that the preliminary injunction purportedly applied only to 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their layoff, and that others who were demoted have been offered back their old positions. First, the injunction is still in force and unless set aside must be complied with in connection with any

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*Together with No. 82-229, *Memphis Fire Department et al.* v. *Stotts et al.*, also on certiorari to the same court.

future layoffs. Second, even if the injunction applied only to the 1981 layoffs, the predicate for it was the ruling that the consent decree must be modified to provide that the layoffs were not to reduce the percentage of black employees, and the lower courts' rulings that the seniority system must be disregarded for the purpose of achieving the mandated result remain undisturbed. Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the cases remain alive. Respondents have failed to convince this Court that the modification and the *pro tanto* invalidation of the seniority system are of no real concern to the city because it will never again contemplate layoffs that if carried out in accordance with the seniority system would violate the modified decree. Finally, the judgment below will have a continuing effect on management of the Fire Department with respect to making whole the white employees who were laid off and thereby lost a month's pay and seniority, or who were demoted and thereby may have backpay claims. Unless that judgment is reversed, the layoffs and demotions were in accordance with the law. The fact that not much money and seniority are involved does not determine mootness. Pp. 568–572.

2. The District Court's preliminary injunction cannot be justified either as an effort to enforce the consent decree or as a valid modification thereof. Pp. 572–583.

(a) The injunction does not merely enforce the agreement of the parties as reflected in the consent decree. The scope of a consent decree must be discerned within its four corners. Here, the consent decree makes no mention of layoffs or demotions nor is there any suggestion of an intention to depart from the existing seniority system or from the Department's arrangement with the union. It therefore cannot be said that the decree's express terms contemplated that such an injunction would be entered. Nor is the injunction proper as carrying out the stated purpose of the decree. The remedy outlined in the decree did not include the displacement of white employees with seniority over blacks and cannot reasonably be construed to exceed the bounds of remedies that are appropriate under Title VII. Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this. Moreover, since neither the union nor the white employees were parties to the suit when the consent decree was entered, the entry of such decree cannot be said to indicate any agreement by them to any of its terms. Pp. 573–576.

(b) The theory that the strong policy favoring voluntary settlement of Title VII actions permits consent decrees that encroach on seniority systems does not justify the preliminary injunction as a legitimate modification of the consent decree. That theory has no application when there is no "settlement" with respect to the disputed issue, such as here where the consent decree neither awarded competitive seniority to the minority employees nor purported to depart from the existing seniority system. Nor can the injunction be so justified on the basis that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. This approach overstates a trial court's authority to disregard a seniority system in fashioning a remedy after a plaintiff has proved that an employer has followed a pattern or practice having a discriminatory effect on black employees. Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination nor any award of competitive seniority to any of them. The Court of Appeals' holding that the District Court's order modifying the consent decree was permissible as a valid Title VII remedial order ignores not only the ruling in *Teamsters* v. *United States*, 431 U. S. 324, that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind § 706(g) of Title VII of providing make-whole relief only to such victims. And there is no merit to the argument that the District Court ordered no more than that which the city could have done by way of adopting an affirmative-action program, since the city took no such action and the modification of the decree was imposed over its objection. Pp. 576–583.

679 F. 2d 541, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 583. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 590. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 593.

Allen S. Blair argued the cause for petitioners in both cases. With him on the brief for petitioner in No. 82–206 was *James R. Newsom III*. *Clifford D. Pierce, Jr.*, and *Louis P. Britt III* filed a brief for petitioners in No. 82–229. Messrs. Blair, Newsom, Pierce, and Britt filed a reply brief for petitioners in both cases.

Solicitor General Lee argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Assistant Attorney General Reynolds*, *Dep-*

uty Assistant Attorney General Cooper, *Carter G. Phillips*, *Brian K. Landsberg*, and *Dennis J. Dimsey*.

Richard B. Fields argued the cause for respondents. With him on the brief were *Thomas M. Daniel*, *Jack Greenberg*, *O. Peter Sherwood*, *Clyde E. Murphy*, *Ronald L. Ellis*, *Eric Schnapper*, and *Barry L. Goldstein*.†

JUSTICE WHITE delivered the opinion of the Court.

Petitioners challenge the Court of Appeals' approval of an order enjoining the City of Memphis from following its seniority system in determining who must be laid off as a result of a budgetary shortfall. Respondents contend that the injunction was necessary to effectuate the terms of a Title VII consent decree in which the City agreed to undertake certain obligations in order to remedy past hiring and promotional practices. Because we conclude that the order cannot be justified, either as an effort to enforce the consent decree or as a valid modification, we reverse.

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†Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *J. Albert Woll*, *Michael H. Gottesman*, *Robert M. Weinberg*, and *Laurence Gold;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman*, *Michele Odorizzi*, *Daniel M. Harris*, *Justin J. Finger*, *Meyer Eisenberg*, *Jeffrey P. Sinensky*, and *Leslie Shedlin;* for the Detroit Police Officers Association by *Walter S. Nussbaum* and *Donald J. Mooney, Jr.;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby;* for the International Association of Fire Fighters, AFL–CIO, by *Edward J. Hickey, Jr.*, and *Michael S. Wolly;* and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio*.

Briefs of *amici curiae* urging affirmance were filed for the City of Detroit by *Frank Jackson;* for the Affirmative Action Coordinating Center et al. by *Morton Stavis*, *Jeanny Mirer*, and *Jules Lobel;* for the American Jewish Congress by *Nathan Z. Dershowitz;* for the Lawyers' Committee for Civil Rights Under Law by *Richard M. Sharp*, *Jeffrey C. Martin*, *Fred N. Fishman*, *Robert H. Kapp*, and *William L. Robinson;* for the Mexican American Legal Defense and Educational Fund by *Robert L. King*, *Joaquin G. Avila*, and *Morris J. Baller;* for the National Black Police Association et al. by *E. Richard Larson* and *Burt Neuborne;* for the National Organization for Women et al. by *Judith I. Avner;* and for Officers for Justice et al. by *Robert L. Harris* and *Eva Jefferson Paterson*.

I

In 1977 respondent Carl Stotts, a black holding the position of firefighting captain in the Memphis, Tenn., Fire Department, filed a class-action complaint in the United States District Court for the Western District of Tennessee. The complaint charged that the Memphis Fire Department and certain city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, as well as 42 U. S. C. §§1981 and 1983. The District Court certified the case as a class action and consolidated it with an individual action subsequently filed by respondent Fred Jones, a black firefighting private in the Department, who claimed that he had been denied a promotion because of his race. Discovery proceeded, settlement negotiations ensued, and, in due course, a consent decree was approved and entered by the District Court on April 25, 1980.

The stated purpose of the decree was to remedy the hiring and promotion practices "of the . . . Department with respect to the employment of blacks." 679 F. 2d 541, 575–576 (CA6 1982) (Appendix). Accordingly, the City agreed to promote 13 named individuals and to provide backpay to 81 employees of the Fire Department. It also adopted the long-term goal of increasing the proportion of minority representation in each job classification in the Fire Department to approximately the proportion of blacks in the labor force in Shelby County, Tenn. However, the City did not, by agreeing to the decree, admit "any violations of law, rule, or regulation with respect to the allegations" in the complaint. *Id.*, at 574. The plaintiffs waived any further relief save to enforce the decree, *ibid.*, and the District Court retained jurisdiction "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Id.*, at 578.

The long-term hiring goal outlined in the decree paralleled the provisions of a 1974 consent decree, which settled a case brought against the City by the United States and which applied citywide. Like the 1974 decree, the 1980 decree also established an interim hiring goal of filling on an annual basis 50 percent of the job vacancies in the Department with qualified black applicants. The 1980 decree contained an additional goal with respect to promotions: the Department was to attempt to ensure that 20 percent of the promotions in each job classification be given to blacks. Neither decree contained provisions for layoffs or reductions in rank, and neither awarded any competitive seniority. The 1974 decree did require that for purposes of promotion, transfer, and assignment, seniority was to be computed "as the total seniority of that person with the City." *Id.*, at 572.

In early May 1981, the City announced that projected budget deficits required a reduction of nonessential personnel throughout the city government. Layoffs were to be based on the "last hired, first fired" rule under which citywide seniority, determined by each employee's length of continuous service from the latest date of permanent employment, was the basis for deciding who would be laid off. If a senior employee's position were abolished or eliminated, the employee could "bump down" to a lower ranking position rather than be laid off. As the Court of Appeals later noted, this layoff policy was adopted pursuant to the seniority system "mentioned in the 1974 Decree and . . . incorporated in the City's memorandum of understanding with the Union." 679 F. 2d, at 549.

On May 4, at respondents' request, the District Court entered a temporary restraining order forbidding the layoff of any black employee. The Union, which previously had not been a party to either of these cases, was permitted to intervene. At the preliminary injunction hearing, it appeared that 55 then-filled positions in the Department were to be eliminated and that 39 of these positions were filled with employees having "bumping" rights. It was estimated that 40 least-senior employees in the firefighting bureau of the Department[1] would be laid off and that of these 25 were white and 15 black. It also appeared that 56 percent of the employees hired in the Department since 1974 had been black and that the percentage of black employees had increased from approximately 3 or 4 percent in 1974 to 11½ percent in 1980.

On May 18, the District Court entered an order granting an injunction. The court found that the consent decree "did not contemplate the method to be used for reduction in rank or lay-off," and that the layoff policy was in accordance with the City's seniority system and was not adopted with any intent to discriminate. Nonetheless, concluding that the proposed layoffs would have a racially discriminatory effect and that the seniority system was not a bona fide one, the District Court ordered that the City "not apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed . . . ." On June 23, the District Court broadened its order to include three additional classifications. A modified layoff plan, aimed at protecting black employees in the seven classifications so as to comply with the court's order, was presented and approved. Layoffs pursuant to the modified plan were then carried out. In certain instances, to comply with the injunction, nonminority employees with more seniority than minority employees were laid off or demoted in rank.[2]

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[1] The Memphis Fire Department is divided into several bureaus, including firefighting, alarm office, administration, apparatus, maintenance, and fire prevention. Of the positions covered by the original injunction, all but one were in the firefighting bureau.

[2] The City ultimately laid off 24 privates, 3 of whom were black. Had the seniority system been followed, 6 blacks would have been among the 24 privates laid off. Thus, three white employees were laid off as a

On appeal, the Court of Appeals for the Sixth Circuit affirmed despite its conclusion that the District Court was wrong in holding that the City's seniority system was not bona fide. 679 F. 2d, at 551, n. 6. Characterizing the principal isssue as "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs," *id.*, at 551, the Court of Appeals concluded that the District Court had acted properly. After determining that the decree was properly approved in the first instance, the court held that the modification was permissible under general contract principles because the City "contracted" to provide "a substantial increase in the number of minorities in supervisory positions" and the layoffs would breach that contract. *Id.*, at 561. Alternatively, the court held that the District Court was authorized to modify the decree because new and unforeseen circumstances had created a hardship for one of the parties to the decree. *Id.*, at 562–563. Finally, articulating three alternative rationales, the court rejected petitioners' argument that the modification was improper because it conflicted with the City's seniority system, which was immunized from Title VII attack under § 703(h) of that Act, 42 U. S. C. § 2000e–2(h).

The Fire Department (and city officials) and the Union filed separate petitions for certiorari. The two petitions were granted, 462 U. S. 1105 (1983), and the cases were consolidated for oral argument.

II

We deal first with the claim that these cases are moot. Respondents submit that the injunction entered in these cases was a preliminary injunction dealing only with the 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their lay-

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direct result of the District Court's order. The number of whites demoted as a result of the order is not clear from the record before us.

off, and that those who were demoted have now been offered back their old positions. Assertedly, the injunction no longer has force or effect, and the cases are therefore moot. For several reasons, we find the submission untenable.

First, the injunction on its face ordered that "the defendants not apply the seniority policy proposed insofar as it will decrease the percentage of black" employees in specified classifications in the Department. The seniority policy was the policy adopted by the City and contained in the collective-bargaining contract with the Union. The injunction was affirmed by the Court of Appeals and has never been vacated. It would appear from its terms that the injunction is still in force and that unless set aside must be complied with in connection with any future layoffs.

Second, even if the injunction itself applied only to the 1981 layoffs, the predicate for the so-called preliminary injunction was the ruling that the consent decree must be construed to mean and, in any event, must be modified to provide that layoffs were not to reduce the percentage of blacks employed in the Fire Department. Furthermore, both the District Court and the Court of Appeals, for different reasons, held that the seniority provisions of the City's collective-bargaining contract must be disregarded for the purpose of achieving the mandated result. These rulings remain undisturbed, and we see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs.

Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the case remains alive.[3] We are quite unconvinced—and it is the respondents' burden to convince us, *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979)—that the modification of the decree and the *pro tanto* invalidation of the seniority system is of no real concern to the City because it will never again contemplate layoffs that if carried out in accordance with the seniority system would violate the modified decree.[4] For this reason alone, the case is not moot.

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[3] The Court of Appeals, recognizing that the District Court had done more than temporarily preclude the City from applying its seniority sys-

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tem, stated that the "principal issue" before it was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F. 2d, at 551.

[4] Of course if layoffs become necessary, both the City and respondents will be affected by the modified decree, the City because it will be unable to apply its seniority system, respondents because they will be given greater protection than they would otherwise receive under that system. Moreover, the City will be immediately affected by the modification even though no layoff is currently pending. If the lower courts' ruling is left intact, the City will no longer be able to promise current or future employees that layoffs will be conducted solely on the basis of seniority. Against its will, the City has been deprived of the power to offer its employees one of the benefits that make employment with the City attractive to many workers. Seniority has traditionally been, and continues to be, a matter of great concern to American workers. "'More than any other provision of the collective [-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766 (1976) (quoting Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962)). It is not idle speculation to suppose that the City will be required to offer greater monetary compensation or fringe benefits in order to attract and retain the same caliber and number of workers as it could without offering such benefits were it completely free to implement its seniority system. The extent to which the City's employment efforts will be harmed by the loss of this "bargaining chip" may be difficult to measure, but in view of the importance that American workers have traditionally placed on such benefits, the harm cannot be said to be insignificant. Certainly, an employer's bargaining position is as substantially affected by a decree precluding it from offering its employees the benefits of a seniority system as it is by a state statute that provides economic benefits to striking employees. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115, 122–125 (1974).

Third, the judgment below will have a continuing effect on the City's management of the Department in still another way. Although the City has restored or offered to restore to their former positions all white employees who were laid off or demoted, those employees have not been made whole: those who were laid off have lost a month's pay, as well as seniority that has not been restored; and those employees who "bumped down" and accepted lesser positions will also have backpay claims if their demotions were unjustified. Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who, as the City points out, lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction.[5] On the other hand, if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to backpay and seniority.

Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. *Powell* v. *McCormack*, 395 U. S. 486, 496–498 (1969). Moreover, a month's pay is not a negligible item for those affected by the injunction, and the loss of a month's competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers, or who is first laid off if there is another reduction in force. These are matters of substance, it seems to us, and enough so to foreclose any claim of mootness. Cf. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 756 (1976); *Powell* v. *McCormack*, *supra*, at 496–498; *Bond* v. *Floyd*, 385 U. S. 116, 128, n. 4 (1966).

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[5] Since the District Court's order precludes the City from reducing the percentage of black employees holding particular jobs in the event of a layoff or reduction in rank and since competitive seniority is the basis for determining who will be laid off or bumped down, there is some question whether, in light of the judgment below, the City could legally restore to the laid-off employees the competitive seniority they had before the layoffs without violating the order.

In short, respondents successfully attacked the City's initial layoff plan and secured a judgment modifying the consent decree, ordering the City to disregard its seniority policy, and enjoining any layoffs that would reduce the percentage of blacks in the Department. Respondents continue to defend those rulings, which, as we have said, may determine the City's disposition of backpay claims and claims for restoration of competitive seniority that will affect respondents themselves. It is thus unrealistic to claim that there is no longer a dispute between the City and respondents with respect to the scope of the consent decree. Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action.[6]

III

The issue at the heart of this case is whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system[7] would have called for the layoff of black employees with less seniority.[8] We are convinced that the Court of Appeals erred in resolving this issue and in affirming the District Court.

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[6] The present case is distinguishable from *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), on which the dissent relies, in that the defendant in *Camenisch* was not a party to a decree that had been modified by the lower court. When the injunction in that case expired, the defendant was in all respects restored to its pre-injunction status. Here, the City is faced with a modified consent decree that prevents it from applying its seniority system in the manner that it chooses.

A

The Court of Appeals first held that the injunction did no more than enforce the terms of the consent decree. This specific-performance approach rests on the notion that because the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force, it breached the decree by attempting to effectuate a layoff policy reducing the percentage of black employees in the Department even though such a policy was mandated by the seniority system adopted by the City and the Union. A variation of this argument is that since the decree permitted the District Court to enter any later orders that "may be necessary or appropriate to effectuate the purposes of this decree," 679 F. 2d, at 578 (Appendix), the City had agreed in advance to an injunction against layoffs that would reduce the proportion of black employees. We are convinced, however, that both of these are improvident constructions of the consent decree.

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[7] Respondents contend that the memorandum of understanding between the Union and the City is unenforceable under state law, citing *Fulenwider* v. *Firefighters Assn. Local Union 1784*, 649 S. W. 2d 268 (Tenn. 1982). However, the validity of that memorandum under state law is unimportant for purposes of the issues presented in this case. First, the Court of Appeals assumed that the memorandum was valid in reaching its decision. 679 F. 2d, at 564, n. 20. Since we are reviewing that decision, we are free to assume the same. Moreover, even if the memorandum is unenforceable, the City's seniority system is still in place. The City unilaterally adopted the seniority system citywide in 1973. That policy was incorporated into the memorandum of understanding with the Firefighters Union in 1975, but its citywide effect, including its application to the Fire Department, continues irrespective of the status of the memorandum.

[8] The dissent's contention that the only issue before us is whether the District Court so misapplied the standards for issuing a preliminary injunction that it abused its discretion, *post*, at 601, overlooks what the District Court did in this case. The District Court did not purport to apply the standards for determining whether to issue a preliminary injunction. It did not even mention them. Instead, having found that the consent decree did "not contemplate what method would be used for a reduction in rank or layoff," the court considered "whether or not . . . it should exercise its authority to modify the consent decree . . . ." App. to Pet. for Cert. in No. 82–229, p. A73. As noted above, the Court of Appeals correctly recognized that more was at stake than a mere preliminary injunction, stating that the "principal issue" was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F. 2d, at 551. By deciding whether the District Court erred in interpreting or modifying the consent decree so as to preclude the City from applying its seniority system, we do not, as the dissent shrills, attempt to answer a question never faced by the lower courts.

It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States* v. *Armour & Co.*, 402 U. S. 673, 681–682 (1971). Here, as the District Court recognized, there is no mention of layoffs or demotions within the four corners of the decree; nor is there any suggestion of an intention to depart from the existing seniority system or from the City's arrangements with the Union. We cannot believe that the parties to the decree thought that the City would simply disregard its arrangements with the Union and the seniority system it was then following. Had there been any intention to depart from the seniority plan in the event of layoffs or demotions, it is much more reasonable to believe that there would have been an express provision to that effect. This is particularly true since the decree stated that it was not "intended to conflict with any provisions" of the 1974 decree, 679 F. 2d, at 574 (Appendix), and since the latter decree expressly anticipated that the City would recognize seniority, *id.*, at 572. It is thus not surprising that when the City anticipated layoffs and demotions, it in the first instance faithfully followed its pre-existing seniority system, plainly having no thought that it had already agreed to depart from it. It therefore cannot be said that the express terms of the decree contemplated that such an injunction would be entered.

The argument that the injunction was proper because it carried out the purposes of the decree is equally unconvincing. The decree announced that its purpose was "to remedy past hiring and promotion practices" of the Department, *id.*, at 575–576, and to settle the dispute as to the "appropriate and valid procedures for hiring and promotion," *id.*, at 574. The decree went on to provide the agreed-upon remedy, but as we have indicated, that remedy did not include the displacement of white employees with seniority over blacks. Furthermore, it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect. As our cases have made clear, however, and as will be reemphasized below, Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this. We thus have no doubt that the City considered its system to be valid and that it had no intention of departing from it when it agreed to the 1980 decree.

Finally, it must be remembered that neither the Union nor the nonminority employees were parties to the suit when the 1980 decree was entered. Hence the entry of that decree cannot be said to indicate any agreement by them to any of its terms. Absent the presence of the Union or the nonminority employees and an opportunity for them to agree or disagree with any provisions of the decree that might encroach on their rights, it seems highly unlikely that the City would purport to bargain away nonminority rights under the then-existing seniority system. We therefore conclude that the injunction does not merely enforce the agreement of the parties as reflected in the consent decree. If the injunction is to stand, it must be justified on some other basis.

B

The Court of Appeals held that even if the injunction is not viewed as compelling compliance with the terms of the decree, it was still properly entered because the District Court had inherent authority to modify the decree when an economic crisis unexpectedly required layoffs which, if carried out as the City proposed, would undermine the affirmative action outlined in the decree and impose an undue hardship on respondents. This was true, the court held, even though the modification conflicted with a bona fide seniority system adopted by the City. The Court of Appeals erred in reaching this conclusion.[9]

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[9] The dissent seems to suggest, *post*, at 611, and n. 9, and JUSTICE STEVENS expressly states, *post*, at 590, that Title VII is irrelevant in determining whether the District Court acted properly in modifying the consent decree. However, this was Title VII litigation, and in affirming modifications of the decree, the Court of Appeals relied extensively on what it considered to be its authority under Title VII. That is the posture in which the cases come to us. Furthermore, the District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961). In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute.

Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since, as we note, *infra*, at 577, Title VII precludes a district court from displacing a nonminority employee with seniority under

Section 703(h) of Title VII provides that it is not an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race.[10] It is clear that the City had a seniority system, that its proposed layoff plan conformed to that system, and that in making the settlement the City had not agreed to award competitive seniority to any minority employee whom the City proposed to lay off. The District Court held that the City could not follow its seniority system in making its proposed layoffs because its proposal was discriminatory in effect and hence not a bona fide plan. Section 703(h), however, permits the routine application of a seniority system absent proof of an intention to discriminate. *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977). Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the City in agreeing to the decree admitted in any way that it had engaged in intentional discrimination. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system, and it would appear that the City could not be faulted for following the seniority plan expressed in its agreement with

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the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in these cases.

[10] Section 703 (h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(h).

the Union. The Court of Appeals nevertheless held that the injunction was proper even though it conflicted with the seniority system. This was error.

To support its position, the Court of Appeals first proposed a "settlement" theory, *i. e.*, that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems. But at this stage in its opinion, the Court of Appeals was supporting the proposition that even if the injunction was not merely enforcing the agreed-upon terms of the decree, the District Court had the authority to modify the decree over the objection of one of the parties. The settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue. Here, the agreed-upon decree neither awarded competitive seniority to the minority employees nor purported in any way to depart from the seniority system.

A second ground advanced by the Court of Appeals in support of the conclusion that the injunction could be entered notwithstanding its conflict with the seniority system was the assertion that "[i]t would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII and 42 U. S. C. §§ 1981 and 1983." 679 F. 2d, at 566. The court concluded that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. Therefore, the court reasoned, "[t]he trial court had authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree." *Ibid.*

The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees. If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), and *Teamsters* v. *United States*, *supra*. *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. 431 U. S., at 367–371. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a nonminority employee laid off to make room for him. He may have to wait until a vacancy occurs,[11] and if there are nonminority employees on layoff, the court must balance the equities in determining who is entitled to the job. *Teamsters*, *supra*, at 371–376. See also *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 236–240 (1982). Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It therefore seems to us that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed.

Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation.[12] That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially balanced work force even though those persons had not been victims of illegal discrimination.[13] Responding to these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:

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[11] Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs. See, *e. g.*, *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 267 (CA4), cert. denied, 429 U. S. 920 (1976); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, 988 (CA5 1969), cert. denied, 397 U. S. 919 (1970).

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [enacted without relevant change as § 706(g)] . . . . Contrary to the allegations of some opponents of this title, there is nothing in it that

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[12] Section 706(g) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title." 86 Stat. 107, 42 U. S. C. § 2000e–5(g).

[13] See H. R. Rep. No. 914, 88th Cong., 1st Sess., 72–73 (1963) (minority report); 110 Cong. Rec. 4764 (1964) (remarks of Sen. Ervin and Sen. Hill); *id.*, at 5092, 7418–7420 (remarks of Sen. Robertson); *id.*, at 8500 (remarks of Sen. Smathers); *id.*, at 9034–9035 (remarks of Sen. Stennis and Sen. Tower).

> will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent." 110 Cong. Rec. 6549 (1964).

An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case[14] likewise made clear that a court was not authorized to give preferential treatment to nonvictims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)] . . . ." *Id.*, at 7214.

Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "Upon conclusion of the trial, the Federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But title VII does not permit the ordering of racial quotas in businesses or unions . . . .*" *Id.*, at 6566 (emphasis added). In like manner, the principal Senate sponsors, in a bipartisan newsletter delivered during an attempted filibuster to each Senator supporting the bill, explained that "[u]nder title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.*, at 14465.[15]

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[14] Senators Clark and Case were the bipartisan "captains" of Title VII. We have previously recognized the authoritative nature of their interpretative memorandum. *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 73 (1982); *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977).

The Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind

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[15] The dissent suggests that Congress abandoned this policy in 1972 when it amended § 706(g) to make clear that a court may award "any other equitable relief" that the court deems appropriate. *Post*, at 619–620. As support for this proposition the dissent notes that prior to 1972, some federal courts had provided remedies to those who had not proved that they were victims. It then observes that in a section-by-section analysis of the bill, its sponsors stated that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7167 (1972).

We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters, supra*, at 354, n. 39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law.

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present § 706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec., at 7168 (emphasis added).

As we noted in *Franks*, the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination.*" 424 U. S., at 764 (emphasis added).

§ 706(g) as well. Accordingly, that holding cannot serve as a basis for sustaining the District Court's order.[16]

Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative-action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in these cases the City took no such action and that the modification of the decree was imposed over its objection.[17]

We thus are unable to agree either that the order entered by the District Court was a justifiable effort to enforce the terms of the decree to which the City had agreed or that it was a legitimate modification of the decree that could be imposed on the City without its consent. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

The various views presented in the opinions in these cases reflect the unusual procedural posture of the cases and the difficulties inherent in allocating the burdens of recession and fiscal austerity. I concur in the Court's treatment of these difficult issues, and write separately to reflect my understanding of what the Court holds today.

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[16] Neither does it suffice to rely on the District Court's remedial authority under §§ 1981 and 1983. Under those sections relief is authorized only when there is proof or admission of intentional discrimination. *Washington* v. *Davis*, 426 U. S. 229 (1976); *General Building Contractors Assn.* v. *Pennsylvania*, 458 U. S. 375 (1982). Neither precondition was satisfied here.

[17] The Court of Appeals also suggested that under *United States* v. *Swift & Co.*, 286 U. S. 106, 114–115 (1932), the decree properly was modified pursuant to the District Court's equity jurisdiction. But *Swift* cannot be read as authorizing a court to impose a modification of a decree that runs counter to statutory policy, see n. 9, *supra*, here §§ 703(h) and 706(g) of Title VII.

I

To appreciate the Court's disposition of the mootness issue, it is necessary to place these cases in their complete procedural perspective. The parties agree that the District Court and the Court of Appeals were presented with a "case or controversy" in every sense contemplated by Art. III of the Constitution. Respondents, as trial-plaintiffs, initiated the dispute, asking the District Court preliminarily to enjoin the City from reducing the percentage of minority employees in various job classifications within the Fire Department. Petitioners actively opposed that motion, arguing that respondents had waived any right to such relief in the consent decree itself and, in any event, that the reductions-in-force were bona fide applications of the citywide seniority system. When the District Court held against them, petitioners followed the usual course of obeying the injunction and prosecuting an appeal. They were, however, unsuccessful on that appeal.

Respondents now claim that the cases have become moot on certiorari to this Court. The recession is over, the employees who were laid off or demoted have been restored to their former jobs, and petitioners apparently have no current need to make seniority-based layoffs. The res judicata effects of the District Court's order can be eliminated by the Court's usual practice of vacating the decision below and remanding with instructions to dismiss. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Thus, respondents conclude that the validity of the preliminary injunction is no longer an issue of practical significance and the cases can be dismissed as moot. See Brief for Respondents 26–28.

I agree with the Court that petitioners and respondents continue to wage a controversy that would not be resolved by merely vacating the preliminary injunction. As a result of the District Court's order, several black employees have more seniority for purposes of future job decisions and entitlements than they otherwise would have under the City's seniority system. This added seniority gives them an increased expectation of future promotion, an increased priority in bidding on certain jobs and job transfers, and an increased protection from future layoffs. These individuals, who are members of the respondent class, have not waived their increased seniority benefits. Therefore, petitioners have a significant interest in determining those individuals' claims in the very litigation in which they were originally won. As the Court of Appeals noted, if petitioner-employer does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity. See 679 F. 2d 541, 555, and n. 12 (CA6 1982); see also *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 229 (1982). Likewise, if petitioner-union accedes to discriminatory employment actions, it will lose both the confidence of its members and bargaining leverage in the determination of who should ultimately bear the burden of the past (and future) fiscal shortages. See *ante*, at 571, and n. 5. Perhaps this explains why, in respondents' words, "the city and union have expended substantial time and effort . . . in [an] appeal which can win no possible relief for the individuals on whose behalf it has ostensibly been pursued." Brief for Respondents 44.

When collateral effects of a dispute remain and continue to affect the relationship of litigants,[1] the case is not moot.

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[1] This case is distinguishable from *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), where the Court found that a petitioner's objections to a preliminary injunction, which required it to pay for the respondent's sign-language interpreter, were moot. In *Camenisch*, the propriety of issuing the preliminary injunction was really no longer of concern to the parties, and the real issue—who should pay for the interpreter—was better handled in a separate proceeding. *Id.*, at 394–398. In these cases, because the parties are in an ongoing relationship, they have a continuing

See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–757 (1976); *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115, 121–125 (1974); *Gray* v. *Sanders*, 372 U. S. 368, 375–376 (1963). In such cases, the Court does not hesitate to provide trial defendants with "a definitive disposition of their objections" on appeal, *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 440 (1976), because vacating the res judicata effects of the decision would not bring the controversy to a close. See Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1677–1687 (1970). As the Court wisely notes, "[litigants] cannot invoke the jurisdiction of a federal court . . . and then insulate [the effects of that court's] ruling from appellate review by claiming that they are no longer interested in the matter." *Ante*, at 572.

II

My understanding of the Court's holding on the merits also is aided by a review of the place this case takes in the history of the parties' litigation. The City entered into a consent decree with respondents, agreeing to certain hiring and promotional goals, backpay awards, and individual promotions. The City was party both to another consent decree and to an agreement with the union concerning application of the seniority system at the time it made these concessions. Respondents did not seek the union's participation in the negotiation of their consent decree with the City, did not include the seniority system as a subject of negotiation, and waived all rights to seek further relief. When the current dispute arose, the District Court rejected respondents' allegation that the seniority system had been adopted or applied with any discriminatory animus. It held, however, that "modification" was appropriate because of the seniority system's discriminatory effects. Under these circumstances, the Court's

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interest in the propriety of the preliminary relief itself. *Camenisch* expressly distinguishes cases like these, where the parties retain "a legally cognizable interest in the determination whether the preliminary injunction was properly granted." *Id.*, at 394; see also *id.*, at 397, and n. 2.

conclusion that the District Court had no authority to order maintenance of racial percentages in the Department is, in my view, inescapable.

Had respondents presented a plausible case of discriminatory animus in the adoption or application of the seniority system, then the Court would be hard pressed to consider entry of the preliminary injunction an abuse of discretion. But that is not what happened here. To the contrary, the District Court rejected the claim of discriminatory animus, and the Court of Appeals did not disagree. Furthermore, the District Court's erroneous conclusion to the contrary, maintenance of racial balance in the Department could not be justified as a correction of an employment policy with an unlawful disproportionate impact. Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities. See *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 65 (1982); *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977).

Therefore, the preliminary injunction could only be justified as a reasonable interpretation of the consent decree or as a permissible exercise of the District Court's authority to modify that consent decree. Neither justification was present here. For the reasons stated by the Court, *ante*, at 574–576, and JUSTICE STEVENS, *post*, at 591, the consent decree itself cannot fairly be interpreted to bar use of the seniority policy or to require maintenance of racial balances previously achieved in the event layoffs became necessary. Nor can a district court unilaterally modify a consent decree to adjust racial imbalances or to provide retroactive relief that abrogates legitimate expectations of other employees and applicants. See *Steelworkers* v. *Weber*, 443 U. S. 193, 205–207 (1979); *Pasadena City Bd. of Education* v. *Spangler*, *supra*, at 436–438. A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination. See *Teamsters* v. *United States*, *supra*, at 367–371; *Milliken* v. *Bradley*, 433 U. S. 267, 280–281 (1977); see also *University of California Regents* v. *Bakke*, 438 U. S. 265, 307–309, and n. 44 (1978) (POWELL, J., announcing the judgment of the Court). Even when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. See *Ford Motor Co.* v. *EEOC*, 458 U. S., at 239–240; *Teamsters* v. *United States*, *supra*, at 371–376. In short, no matter how significant the change in circumstance, a district court cannot unilaterally modify a consent decree to adjust racial balances in the way the District Court did here.[2]

To be sure, in 1980, respondents could have gone to trial and established illegal discrimination in the Department's past hiring practices, identified its specific victims, and possibly obtained retroactive seniority for those individuals. Alternatively, in 1980, in negotiating the consent decree, respondents could have sought the participation of the union,[3] negotiated the identities of the specific victims with the union and employer, and possibly obtained limited forms of retroactive relief. But respondents did none of these things. They chose to avoid the costs and hazards of litigating their claims. They negotiated with the employer without inviting the union's participation. They entered into a consent decree without establishing any specific victim's identity. And, most importantly, they waived their right to seek further relief. To allow respondents to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is a condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements. See *Steelworkers* v. *Weber*, *supra*, at 211 (BLACKMUN, J., concurring) (employers enter into settlements to avoid backpay responsibilities and to reduce disparate impact claims). Modifications requiring maintenance of racial balance would not encourage valid settlements[4] of employment discrimination cases. They would impede them. Thus, when the Court states that this preferential relief could not have been awarded even had *this case* gone to trial, see *ante*, at 579, it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby furthering the statutory policy of voluntary settlement. See *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88, and n. 14 (1981).

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[2] Unlike the dissenters and JUSTICE STEVENS, I find persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue, see *ante*, at 576–577, n. 9, and the Court's application of Title VII's provisions to the facts of the present controversy.

[3] "Absent a judicial determination, . . . the Company . . . cannot alter the collective-bargaining agreement without the Union's consent." *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 771 (1983). Thus, if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.

In short, the Court effectively applies the criteria traditionally applicable to the review of preliminary injunctions. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). When the Court disapproves the preliminary injunction issued in this litigation, it does so because respondents had no chance of succeeding on the merits of their claim. The District Court had no authority to order the Department to maintain its current racial balance or to provide preferential treatment to blacks. It therefore abused its discretion. On this understanding, I join the opinion and judgment rendered by the Court today.

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[4] The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 278–296 (1976) (Title VII and 42 U. S. C. § 1981 prohibit discrimination against whites as well as blacks); *Steelworkers* v. *Weber*, 443 U. S. 193, 208–209 (1979) (listing attributes that would make affirmative action plan impermissible); cf. *id.*, at 215 (BLACKMUN, J., concurring) ("[S]eniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights").

JUSTICE STEVENS, concurring in the judgment.

The District Court's preliminary injunction remains reviewable because of its continuing effect on the city's personnel policies. That injunction states that the city may "not apply the seniority policy proposed insofar as it will decrease the percentage of black [persons] in the Memphis Fire Department."[1] Thus, if the city faces a need to lay off Fire Department employees in the future, it may not apply its seniority system. I cannot say that the likelihood that the city will once again face the need to lay off Fire Department employees is so remote that the city has no stake in the outcome of this litigation.[2]

In my judgment, the Court's discussion of Title VII is wholly advisory. These cases involve no issue under Title VII; they involve only the administration of a consent decree. The District Court entered the consent decree on April 25, 1980, after having given all parties, including all of the petitioners in this Court, notice and opportunity to object to its entry. The consent decree, like any other final judgment of a district court, was immediately appealable. See *Carson* v. *American Brands, Inc.*, 450 U. S. 79 (1981). No appeal was taken. Hence, the consent decree became a final judgment binding upon those who had had notice and opportunity to object; it was and is a legally enforceable obligation. If the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction.[3] Therefore, what governs these cases is not Title VII, but the consent decree.[4]

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[1] See also n. 6, *infra*. There were actually three injunctive orders entered by the District Court, each applying to different positions in the Memphis Fire Department. All use substantially the same language.

[2] In this respect, this litigation is similar to *Los Angeles* v. *Lyons*, 461 U. S. 95, 100–101 (1983). There, an injunction against the use of chokeholds by the city's police department was held not to be moot despite the fact that the police board had instituted a voluntary moratorium of indefinite duration on chokeholds, since the likelihood that the city might one day wish to return to its former policy was not so remote as to moot the case. See also *Carroll* v. *Princess Anne*, 393 U. S. 175, 178–179 (1968).

There are two ways in which the District Court's injunction could be justified. The first is as a construction of the consent decree. If the District Court had indicated that it was merely enforcing the terms of the consent decree, and had given some indication of what portion of that decree it was interpreting, I might be hard pressed to consider the entry of the injunction an abuse of discretion. However, the District Court never stated that it was construing the decree, nor did it provide even a rough indication of the portion of the decree on which it relied. There is simply nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree.[5]

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[3] The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII. *Ante,* at 578–579. I share JUSTICE BLACKMUN's doubts as to whether this is the correct test. See *post,* at 611, n. 9, 614–616. The provisions on which the Court relies, 42 U. S. C. §§ 2000e–2(h) and 2000e–5(g), merely state that certain seniority arrangements do not violate Title VII, and define the limits of appropriate relief for a Title VII violation, respectively. They do not place any limitations on what the parties can agree to in a consent decree. The Court does not suggest that any other statutory provision was violated by the District Court. The Court itself acknowledges that the administration of a consent decree must be tested by the four corners of the decree, and not by what might have been ordered had respondents prevailed on the merits, *ante,* at 574, which makes its subsequent discussion of Title VII all the more puzzling.

[4] If the decree had been predicated on a finding that the city had violated Title VII, the remedial policies underlying that Act might be relevant, at least as an aid to construction of the decree. But since the settlement expressly disavowed any such finding, the Court's exposition of Title VII law is unnecessary.

[5] JUSTICE BLACKMUN explains, *post,* at 607–610, how the consent decree could be construed to justify the injunction. I find nothing in the record

The second justification that could exist for the injunction is that the District Court entered it based on a likelihood that it would modify the decree, or as an actual modification of the decree.[6] As JUSTICE BLACKMUN explains, *post*, at 607, 610–611, modification would have been appropriate if respondents had demonstrated the presence of changed circumstances. However, the only "circumstance" found by the District Court was that the city's proposed layoffs would have an adverse effect on the level of black employment in the fire department. App. to Pet. for Cert. in No. 82–206, pp. A73–A76. This was not a "changed" circumstance; the percentage of blacks employed by the Memphis Fire Department at the time the decree was entered meant that even then it was apparent that any future seniority-based layoffs would have an adverse effect on blacks. Thus the finding made by the District Court was clearly insufficient to support a modification of the consent decree, or a likelihood thereof.

Accordingly, because I conclude that the District Court abused its discretion in entering the preliminary injunction at issue here, I concur in the judgment.

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indicating that this is the theory the District Court actually employed. While I recognize that preliminary injunction proceedings are often harried affairs and that district courts need substantial leeway in resolving them, it nevertheless remains the case that there must be something in the record explaining the reasoning of the District Court before it may be affirmed. That is the purpose of Federal Rule of Civil Procedure 65(d)'s requirement that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . ."

[6] It seems likely that this second justification was the actual basis for the entry of the injunction. The District Court's phrasing of the question it faced was whether "it should exercise its authority to modify a Consent Decree," App. to Pet. for Cert. A73. The focus of the Court of Appeals' opinion reviewing the preliminary injunction was the "three grounds upon which a consent decree may later be modified," 679 F. 2d 541, 560 (CA6 1981). Most important, the practical effect of the District Court's action indicates that it should be treated as a modification. Until it is reviewed, it will effectively govern the procedure that the city must follow in any future layoffs, and that procedure is significantly different from the seniority system in effect when the consent decree was negotiated and signed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today's opinion is troubling less for the law it creates than for the law it ignores. The issues in these cases arose out of a preliminary injunction that prevented the city of Memphis from conducting a particular layoff in a particular manner. Because that layoff has ended, the preliminary injunction no longer restrains any action that the city wishes to take. The Court nevertheless rejects respondents' claim that these cases are moot because the Court concludes that there are continuing effects from the preliminary injunction and that these create a continuing controversy. The Court appears oblivious, however, to the fact that any continuing legal consequences of the preliminary injunction would be erased by simply vacating the Court of Appeals' judgment, which is this Court's longstanding practice with cases that become moot.

Having improperly asserted jurisdiction, the Court then ignores the proper standard of review. The District Court's action was a preliminary injunction reviewable only on an abuse-of-discretion standard; the Court treats the action as a permanent injunction and decides the merits, even though the District Court has not yet had an opportunity to do so. On the merits, the Court ignores the specific facts of these cases that make inapplicable the decisions on which it relies. Because, in my view, the Court's decision is demonstrably in error, I respectfully dissent.

I

Mootness. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In the absence of a live controversy, the constitutional requirement of a "case" or "controversy," see U. S. Const., Art. III, deprives a federal court of jurisdiction. Accordingly, a case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication. *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974). In such a situation, the federal practice is to vacate the judgment and remand the case with a direction to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

Application of these principles to the present cases is straightforward. The controversy underlying the suits is whether the city of Memphis' proposed layoff plan violated the 1980 consent decree. The District Court granted a preliminary injunction limiting the proportion of Negroes that the city could lay off as part of its efforts to solve its fiscal problems. Because of the injunction, the city chose instead to reduce its work force according to a modified layoff plan under which some whites were laid off despite their greater seniority over the blacks protected by the preliminary injunction. Since the preliminary injunction was entered, however, the layoffs all have terminated and the city has taken back every one of the workers laid off pursuant to the modified plan. Accordingly, the preliminary injunction no longer restrains the city's conduct, and the adverse relationship between the opposing parties concerning its propriety is gone. A ruling in this situation thus becomes wholly advisory, and ignores the basic duty of this Court "'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Oil Workers* v. *Missouri*, 361 U. S. 363, 367 (1960), quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895). The proper disposition, therefore, is to vacate the judgment and remand the cases with directions to dismiss them as moot.

The purpose of vacating a judgment when it becomes moot while awaiting review is to return the legal relationships of the parties to their status prior to initiation of the suit. The Court explained in *Munsingwear* that vacating a judgment

> "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U. S., at 40.

Were the Court to follow this procedure in these cases, as clearly it should, the legal rights of the parties would return to their status prior to entry of the preliminary injunction. In the event that future layoffs became necessary, respondents would have to seek a new injunction based on the facts presented by the new layoffs, and petitioners could oppose the new injunction on any and all grounds, including arguments similar to those made in these cases.

Struggling to find a controversy on which to base its jurisdiction, the Court offers a variety of theories as to why these cases remain live. First, it briefly suggests that the cases are not moot because the preliminary injunction continues in effect and would apply in the event of a future layoff. My fundamental disagreement with this contention is that it incorrectly interprets the preliminary injunction.[1] Even if the

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[1] It is readily apparent from the terms of the preliminary injunction that it applied only to the layoffs contemplated in May 1981, and that the union would have to seek a new injunction if it sought to stop layoffs contemplated in the future. The preliminary injunction applied only to the positions—lieutenant, driver, inspector, and private—in which demotions or layoffs were then planned. It makes little sense to interpret this preliminary injunction to apply to future layoffs that might involve different positions. In addition, the minimum percentage of Negroes that the city was to retain was that of blacks "presently employed" in those positions, a standard that has no pertinence if applied to future layoffs when minority employment levels would be higher than in 1981. App. to Pet. for Cert. in No. 82-229, p. A77. Finally, the reasoning of the District Court in granting the preliminary injunction was based expressly on "the effect of *these* lay-offs and reductions in rank." *Id.*, at A78 (emphasis supplied). Thus,

Court's interpretation of the preliminary injunction is correct, however, it is nonetheless true that if the judgment in these cases were vacated, the preliminary injunction would not apply to a future layoff.

The Court's second argument against mootness is remarkable. The Court states that even if the preliminary injunction applies only to the 1981 layoffs, the "rulings" that formed the "predicate" for the preliminary injunction "remain undisturbed." *Ante*, at 569. The Court then states:

> "[W]e see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs." *Ibid.*

Two aspects of this argument provoke comment. It is readily apparent that vacating the judgment in these cases would also vacate whatever "rulings" formed the "predicate" for that judgment. There simply is no such thing as a "ruling" that has a life independent of the judgment in these cases and that would bind the city in a future layoff if the judgment in these cases were vacated. The Court's argument, therefore, is nothing more than an oxymoronic suggestion that the judgment would somehow have a res judicata effect even if it was vacated—a complete contradiction in terms.

Moreover, and equally remarkable, is the notion that respondents must concede that the rulings below were in error before they can argue that the cases are moot. To my knowledge, there is nothing in this Court's mootness doctrine that requires a party urging mootness to concede the lack of

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it is clear that that the District Court viewed the preliminary injunction as a response to the problem presented by the May 1981 layoffs rather than to the problem of layoffs generally.

merit in his case. Indeed, a central purpose of mootness doctrine is to avoid an unnecessary ruling on the merits.

The Court's third argument against mootness focuses on the wages and seniority lost by white employees during the period of their layoffs—and it is undisputed that some such pay and seniority were lost. The Court does not suggest, however, that its decision today will provide the affected workers with any backpay or seniority. It is clear that any such backpay or retroactive seniority for laid-off workers would have to come from the city, not from respondents.[2] But the city Fire Department and the union are both *petitioners* here, not adversaries, and respondents have no interest in defending the city from liability to the union in a separate proceeding. For that reason, these suits involve the wrong adverse parties for resolution of any issues of backpay and seniority.

The Court, nevertheless, suggests that the backpay and seniority issues somehow keep these cases alive despite the absence of an adversarial party. The Court states:

> "Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who . . . lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction. On the other hand, if the Court

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[2] In the event that the laid-off firefighters were to bring a successful action for backpay against the city, the city would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction. No bond was posted for the preliminary injunction, and "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 770, n. 14 (1983).

> of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to backpay and seniority." *Ante*, at 571 (footnote omitted).

Although the artful ambiguity of this passage renders it capable of several interpretations, none of them provides a basis on which to conclude that these cases are not moot. The Court may mean to suggest that the city has no legal obligation to provide backpay and retroactive seniority, but that it might voluntarily do so if this Court opines that the preliminary injunction was improper. A decision in that situation, however, would be an advisory opinion in the full sense—it would neither require nor permit the city to do anything that it cannot do already.

It is more likely that the Court means one of two other things. The Court may mean that if the Court of Appeals' decision is left standing, it would have some kind of preclusive effect in a suit for backpay and retroactive seniority brought by the union against the city. Alternatively, the Court may mean that if the city sought voluntarily to give union members the backpay and retroactive seniority that they lost, the respondents could invoke the preliminary injunction to prohibit the city from doing so.

Even if both of these notions were correct—which they clearly are not, see *infra*, at 599–601, and nn. 3, 4, and 5—they are irrelevant to the question of mootness. The union has not filed a suit for backpay or seniority, nor has the preliminary injunction prevented the city from awarding retroactive seniority to the laid-off workers. Accordingly, these issues simply are not in the cases before the Court, and have no bearing on the question of mootness. In *Oil Workers* v. *Missouri*, 361 U. S. 363 (1960), for example, the Court declined to review an expired antistrike injunction issued pursuant to an allegedly unconstitutional state statute, even though the challenged statute also governed a monetary penalty claim pending in state court against the union. The Court stated: "'[T]hat suit is not before us. We have not now jurisdiction of it or its issues. *Our power only extends over and is limited by the conditions of the case now before us.*'" *Id.*, at 370 (emphasis added), quoting *American Book Co.* v. *Kansas ex rel. Nichols*, 193 U. S. 49, 52 (1904). By vacating this judgment as moot, the Court would ensure that in the event that a controversy over backpay and retroactive seniority should arise, the parties in these cases could relitigate any issues concerning the propriety of the preliminary injunction as it relates to that controversy. Thus, the Court today simply has its reasoning backwards. It pretends that these cases present a live controversy because the judgment in them might affect future litigation; yet the Court's longstanding practice of vacating moot judgments is designed precisely to prevent that result.

By going beyond the reach of the Court's Art. III powers, today's decision improperly provides an advisory opinion for the city and the union. With regard to the city's ability to give retroactive seniority and backpay to laid-off workers, respondents concede that neither the preliminary injunction nor the Court of Appeals' judgment prohibits the city from taking such action,[3] Brief for Respondents 30–31. The city has not claimed any confusion over its ability to make such an award; it simply has chosen not to do so. Thus, the opinion today provides the city with a decision to ensure that it can do something that it has not claimed any interest in doing and has not been prevented from doing, and that respondents concede they have no way of stopping.

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[3] It was the city's layoff policy, not the preliminary injunction, that prevented the laid-off workers from accruing seniority during their layoffs. Paragraph 6B of "Benefits" of the city's written "Layoff Policy," adopted unilaterally by the city in April 1981, states: "Employees shall not receive seniority credit during their layoff period." App. 95. If the laid-off workers are to receive retroactive seniority, it will be because the city chooses to change this policy—which they always have been free to do—not because the preliminary injunction has been invalidated. Although the Court feigns uncertainty on this matter, *ante*, at 571, n. 5, as does JUSTICE O'CONNOR in her separate opinion, *ante*, at 584–585, there is simply no indication in these cases that the city wants to give the laid-off workers retroactive seniority but is unable to do so because of the preliminary injunction.

With regard to the union, the Court's imagined controversy is even more hypothetical. The Court concedes that there is doubt whether, in fact, the union possesses any enforceable contractual rights that could form the basis of a contract claim by the union against the city.[4] It is also unclear how the propriety of the preliminary injunction would affect the city's defenses in such a suit.[5] In any event, no such claims have been filed. Thus, today's decision is provided on the theory that it might affect a defense that the city has not asserted, in a suit that the union has not brought, to enforce contractual rights that may not exist.

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[4] It appears that if the union enjoys any contractual rights at all, they derive from the "Memorandum of Understanding" between the union and the city, which indicates that layoffs shall be made on the basis of seniority. App. to Pet. for Cert. in No. 82–206, p. A81. The Tennessee Supreme Court recently has confirmed, however, that the Memorandum of Understanding confers no enforceable rights, *Fulenwider* v. *Firefighters Assn. Local Union 1784*, 649 S. W. 2d 268 (1982), because of state-law limits on the authority of municipalities to contract with labor organizations. Thus, the likely reason that the union has not filed a suit for backpay is because it has no enforceable rights.

I am at somewhat of a loss trying to understand the Court's suggestion that the District Court's preliminary injunction somehow prevented contract liability from arising between the city and the affected white employees. As is explained more fully *infra*, the preliminary injunction did not require the city to lay off anyone. The preliminary injunction merely prohibited the city from laying off more than a certain proportion of Negroes. In the face of that constraint, the city decided to proceed with layoffs and to lay off whites instead of the protected Negroes. If in so doing the city breached contractual rights of the white employees, those rights remained enforceable. See *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983) (employer could be held liable for breach of collective-bargaining agreement when, because women employees were protected by an injunction, it laid off male employees with greater seniority).

[5] An enjoined party is required to obey an injunction issued by a federal court within its jurisdiction even if the injunction turns out on review to have been erroneous, and failure to obey such an injunction is punishable by contempt. *Walker* v. *City of Birmingham*, 388 U. S. 307, 314 (1967). Given that the city could have been punished for contempt if it had disregarded the preliminary injunction, regardless of whether the injunction on appeal were found erroneous, it seems unlikely that a defense to a breach of contract would turn on whether the preliminary injunction is upheld on

II

Because there is now no justiciable controversy in these cases, today's decision by the Court is an improper exercise of judicial power. It is not my purpose in dissent to parallel the Court's error and speculate on the appropriate disposition of these nonjusticiable cases. In arriving at its result, however, the Court's analysis is misleading in many ways, and in other ways it is simply in error. Accordingly, it is important to note the Court's unexplained departures from precedent and from the record.

A

Assuming, *arguendo*, that these cases are justiciable, then the only question before the Court is the validity of a *preliminary* injunction that prevented the city from conducting layoffs that would have reduced the number of Negroes in certain job categories within the Memphis Fire Department. In granting such relief, the District Court was required to consider respondents' likelihood of success on the merits, the balance of irreparable harm to the parties, and whether the injunction would be in the public interest. *University of Texas* v. *Camenisch*, 451 U. S. 390, 392 (1981); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). The question before a reviewing court "is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Id.*, at 932.

The Court has chosen to answer a different question. The Court's opinion does not mention the standard of review for a preliminary injunction, and does not apply that standard to

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appeal as opposed to the city's obligation to obey the injunction when entered.

these cases. Instead, the Court treats the cases as if they involved a *permanent* injunction, and addresses the question whether the city's proposed layoffs violated the consent decree.[6] That issue was never resolved in the District Court because the city did not press for a final decision on the merits. The issue, therefore, is not properly before this Court. After taking jurisdiction over a controversy that no longer exists, the Court reviews a decision that was never made.

In so doing, the Court does precisely what in *Camenisch*, *supra*, it unanimously concluded was error. *Camenisch* involved a suit in which a deaf student obtained a preliminary injunction requiring that the University of Texas pay for an interpreter to assist him in his studies. While appeal of the preliminary injunction was pending before the Court of Appeals, the student graduated. The Court of Appeals affirmed the District Court. In so doing, the appellate court rejected Camenisch's suggestion that his graduation rendered the case moot because the District Court had required Camenisch to post a bond before granting the preliminary injunction, and there remained the issue whether the University or Camenisch should bear the cost of the interpreter. This Court granted certiorari and vacated and remanded the case to the District Court. The Court explained:

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[6] The Court's attempt to recharacterize the preliminary injunction as a permanent one is wholly unpersuasive. Respondents' request for injunctive relief specifically sought a preliminary injunction, and carefully laid out the standards for the issuance of such an injunction. App. 20–22. Petitioners' response in opposition to the request for injunctive relief was devoted entirely to explaining that the standards for a preliminary injunction had not been met. *Id.*, at 25–28. The District Court's order granting injunctive relief was entitled an "Order Granting Preliminary Injunction," and a later order expanding the injunctive relief to include more positions was entitled an "Order Expanding Preliminary Injunction." App. to Pet. for Cert. in No. 82–229, pp. A77, A82. The Court of Appeals expressly defined the nature of its inquiry by stating:

> "We must weigh whether the plaintiffs have shown a strong possibility of success on the merits, whether the plaintiff or defendant would suffer irreparable harm and whether the public interest warrants the injunction. . . . The standard of appellate review is whether the district court abused its discretion in granting the preliminary injunction.
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> "[The District Judge] did not abuse his discretion in granting the preliminary injunction." 679 F. 2d 541, 560 (CA6 1982).

It is hard to imagine a clearer statement that the issue considered by the Court of Appeals was the propriety of a preliminary injunction. In any event, even if the Court of Appeals went beyond the scope of its appropriate review, it would be our duty to correct that error, not to follow it.

> "The Court of Appeals correctly held that the case as a whole is not moot, since, as that court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, *the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him. . . . The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors [for granting preliminary injunctions], while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.*
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> . . . . .
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> "*Until [a trial on the merits] has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit.*" 451 U. S., at 393, 398 (emphasis added).

Camenisch makes clear that a determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and that a reviewing court should not confuse the two. Even if the issues presented by the preliminary injunction in these cases were not moot, therefore, the only issue before this Court would be the propriety of preliminary injunctive relief.[7] See also *New York State Liquor Au-*

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[7] The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in

thority v. *Bellanca*, 452 U. S. 714, 716 (1981); *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 931–932, 934. It is true, of course, that the District Court and the Court of Appeals had to make a preliminary evaluation of respondents' likelihood of success on the merits, but that evaluation provides no basis for deciding the merits:

> "Since Camenisch's likelihood of success on the merits was one of the factors the District Court and the Court of Appeals considered in granting Camenisch a preliminary injunction, it might be suggested that their decisions were tantamount to decisions on the underlying merits and thus that the preliminary-injunction issue is not truly moot. . . . *This reasoning fails, however, because it improperly equates 'likelihood of success' with 'success,' and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions.*" 451 U. S., at 394 (emphasis added).

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a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional. Like the proceedings in *Camenisch*, those in this litigation "bear the marks of the haste characteristic of a request for a preliminary injunction." 451 U. S., at 398. The hearing on the preliminary injunction was held four days after the layoffs had been announced. With the exception of a single deposition the day before the hearing, there was no discovery. In opening the hearing, the trial judge noted: "One of the problems with these injunction hearings centers around the fact that the lawyers don't have the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are . . . . I got an idea from the lawyers—I am not sure that they were finally decided on what route they were going . . . ." App. 30. It is true that the District Court made a few of what generously could be described as findings and conclusions, but, as the Court in *Camenisch* pointed out, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." 451 U. S., at 395. Accordingly, there is simply no proper basis on which this Court legitimately can decide the question whether the city's proposed layoffs violated the consent decree.

B

After ignoring the appropriate standard of review, the Court then focuses on an issue that is not in these cases. It begins its analysis by stating that the "issue at the heart of this case" is the District Court's power to "ente[r] an injunction requiring white employees to be laid off." *Ante*, at 572. That statement, with all respect, is simply incorrect. On its face, the preliminary injunction prohibited the city from conducting layoffs in accordance with its seniority system "insofar as it will decrease the percentage of blacks [presently employed]" in certain job categories. App. to Pet. for Cert. in No. 82–229, p. A80. The preliminary injunction did not require the city to lay off any white employees at all. In fact, several parties interested in the suit, including the union, attempted to persuade the city to avoid layoffs entirely by reducing the working hours of all Fire Department employees. See Brief for Respondents 73. Thus, although the District Court order reduced the city's options in meeting its fiscal crisis, it did not require the dismissal of white employees. The choice of a modified layoff plan remained that of the city.

This factual detail is important because it makes clear that the preliminary injunction did not abrogate the contractual rights of white employees. If the modified layoff plan proposed by the city to comply with the District Court's order abrogated contractual rights of the union, those rights remained enforceable. This Court recognized this principle just last Term in *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983), which presented a situation remarkably similar to the one here. In that case, an employer sought to conduct layoffs and faced a conflict between a Title VII conciliation agreement protecting its female employees and the seniority rights of its male employees. The employer chose to lay off male employees, who filed grievances and obtained awards for the violation of their contractual rights. In upholding the awards, this Court explained that the dilemma faced by the employer did not render the male employees' contractual rights unenforceable:

> "Given the Company's desire to reduce its work force, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." *Id.*, at 767.

It is clear, therefore, that the correctness of the District Court's interpretation of the decree is irrelevant with respect to the enforceability of the union's contractual rights; those rights remained enforceable regardless of whether the city had an obligation not to lay off blacks.[8] The question in these cases remains whether the District Court's authority pursuant to the consent decree enabled it to enjoin a layoff of more than a certain number of blacks. The issue is not whether the District Court could require the city to lay off whites, or whether the District Court could abrogate contractual rights of white firefighters.

III

Assuming, as the Court erroneously does, that the District Court entered a permanent injunction, the question on review then would be whether the District Court had authority to enter it. In affirming the District Court, the Court of Appeals suggested at least two grounds on which respondents might have prevailed on the merits.

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[8] Judge Martin's opinion concurring in part and dissenting in part from the Sixth Circuit's decision is based on precisely this point. See 679 F. 2d, at 569.

A

The first of these derives from the contractual characteristics of a consent decree. Because a consent decree "is to be construed for enforcement purposes basically as a contract," *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 238 (1975), respondents had the right to specific performance of the terms of the decree. If the proposed layoffs violated those terms, the District Court could issue an injunction requiring compliance with them. Alternatively, the Court of Appeals noted that a court of equity has inherent power to modify a consent decree in light of changed circumstances. 679 F. 2d 541, 560–561 (CA6 1982). Thus, if respondents could show that changed circumstances justified modification of the decree, the District Court would have authority to make such a change.

Respondents based their request for injunctive relief primarily on the first of these grounds, and the Court's analysis of this issue is unpersuasive. The District Court's authority to enforce the terms and purposes of the consent decree was expressly reserved in ¶ 17 of the decree itself: "The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." App. to Pet. for Cert. in No. 82–229, p. A69. Respondents relied on that provision in seeking the preliminary injunction. See Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction 1. The decree obligated the city to provide certain specific relief to particular individuals, and to pursue a long-term goal to "raise the black representation in each job classification on the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." App. to Pet. for Cert. in No. 82–229, p. A64. The decree set more specific goals for hiring and promotion opportunities as well. To meet these goals, the decree "require[d] reasonable, good faith efforts on the part of the City." *Ibid.*

In support of their request for a preliminary injunction, respondents claimed that the proposed layoffs would adversely affect blacks significantly out of proportion to their representation. Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction, pp. 1–2. They argued that the proposed layoffs were "designed to thwart gains made by blacks" under the decree. *Id.*, at 2. Their argument emphasized that the Mayor had "absolute discretion to choose which job classifications" were to be affected by the layoffs, *ibid.*, and that the "ranks chosen by the Mayor for demotion are those where blacks are represented in the greatest number." *Id.*, at 4. Respondents claimed that such a layoff plan "violates the spirit of the 1980 Consent Decree." *Id.*, at 3. Had respondents been able to prove these charges at trial, they may well have constituted a violation of the city's obligation of good faith under the decree. On the basis of these claims, the limited evidence presented at the hearing prior to the issuance of the preliminary injunction, and the District Court's familiarity with the city's past behavior, the District Court enjoined the city from laying off blacks where the effect would have been to reduce the percentage of black representation in certain job categories. By treating the District Court's injunction as a permanent one, however, the Court first deprives respondents of the opportunity to substantiate these claims, and then faults them for having failed to do so. But without determining whether these allegations have any substance, there is simply no way to determine whether the proposed layoff plan violated the terms of the consent decree.

Even if respondents could not have shown that the proposed layoff plan conflicted with the city's obligation of good faith, ¶ 17 of the decree also empowered the District Court to enter orders to "effectuate the purposes" of the decree. Thus, if the District Court concluded that the layoffs would frustrate those purposes, then the decree empowered the District Court to enter an appropriate order. Once again, however, on the limited factual record before the Court, it is improper to speculate about whether the layoffs would have frustrated the gains made under the consent decree sufficiently to justify a permanent injunction.

The Court rejects the argument that the injunctive relief was a proper exercise of the power to enforce the purposes of the decree principally on the ground that the remedy agreed upon in the consent decree did not specifically mention layoffs. *Ante*, at 575. This treatment of the issue is inadequate. The power of the District Court to enter further orders to effectuate the purposes of the decree was a part of the agreed remedy. The parties negotiated for this, and it is the obligation of the courts to give it meaning. In an ideal world, a well-drafted consent decree requiring structural change might succeed in providing explicit directions for all future contingencies. But particularly in civil rights litigation in which implementation of a consent decree often takes years, such foresight is unattainable. Accordingly, parties to a consent decree typically agree to confer upon supervising courts the authority to ensure that the purposes of a decree are not frustrated by unforeseen circumstances. The scope of such authority in an individual case depends principally upon the intent of the parties. Viewed in this light, recourse to such broad notions as the "purposes" of a decree is not a rewriting of the parties' agreement, but rather a part of the attempt to implement the written terms. The District Judge in these cases, who presided over the negotiation of the consent decree, is in a unique position to determine the nature of the parties' original intent, and he has a distinctive familiarity with the circumstances that shaped the decree and defined its purposes. Accordingly, he should be given special deference to interpret the general and any ambiguous terms in the decree. It simply is not a sufficient response to conclude, as the Court does, that the District Court could not enjoin the proposed layoff plan merely because layoffs were not specifically mentioned in the consent decree.

In this regard, it is useful to note the limited nature of the injunctive relief ordered by the District Court. The preliminary injunction did not embody a conclusion that the city could never conduct layoffs in accordance with its seniority policy. Rather, the District Court preliminarily enjoined a particular application of the seniority system as a basis for a particular set of layoffs. Whether the District Court would enjoin a future layoff presumably would depend on the factual circumstances of that situation. Such a future layoff presumably would affect a different proportion of blacks and whites; the black representation in the Fire Department presumably would be higher; the layoffs presumably would negate a smaller portion of the gains made under the decree; and the judge would have worked with the parties at implementing the decree for a longer period of time. There is no way of knowing whether the District Court would conclude that a future layoff conducted on the basis of seniority would frustrate the purposes of the decree sufficiently to justify an injunction. For this reason, the Court is wrong to attach such significance to the fact that the consent decree does not provide for a suspension of the seniority system during all layoffs, for that is not what the District Court ordered in these cases.

B

The Court of Appeals also suggested that respondents could have prevailed on the merits because the 1981 layoffs may have justified a modification of the consent decree. This Court frequently has recognized the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932); accord, *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 437 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244, 251 (1968). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Railway Employees* v. *Wright*, 364 U. S. 642, 647 (1961). The test for ruling on a plaintiff's request for a modification of a consent decree is "whether the change serve[s] to effectuate . . . the basic purpose of the original consent decree." *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562 (1942).

The Court rejects this ground for affirming the preliminary injunction, not by examining the purposes of the *consent decree* and whether the proposed layoffs justified a modification of the decree, but rather by reference to Title VII. The Court concludes that the preliminary injunction was improper because it "imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Ante*, at 579. Thus, the Court has chosen to evaluate the propriety of the preliminary injunction by asking what type of relief the District Court could have awarded had respondents litigated their Title VII claim and prevailed on the merits. Although it is far from clear whether that is the right question,[9] it is clear that the Court has given the wrong answer.

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[9] The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial. In addressing the Court's analysis, I do not mean to imply that I accept its premise as correct. In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), this Court considered whether an affirmative-action plan adopted voluntarily by an employer violated Title VII because it discriminated against whites. In holding that the plan was lawful, the Court stressed that the voluntariness of the plan informed the nature of its inquiry. *Id.*, at 200; see also *id.*, at 211 (concurring opinion). Because a consent decree is an agreement that is enforceable in court, it has qualities of both voluntariness and compulsion. The Court has explained that Congress intended to encourage voluntary settlement of Title VII suits, *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88, n. 14 (1981), and cooperative private efforts to eliminate the lingering effects of past discrimination. *Weber*, 443 U. S., at 201–207. It is by no means clear, therefore, that the permissible scope of relief available under a consent decree is the same as could be ordered by a court after a finding of liability at trial.

Had respondents prevailed on their Title VII claims at trial, the remedies available would have been those provided by § 706(g), 42 U. S. C. § 2000e–5(g). Under that section, a court that determines that an employer has violated Title VII may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . , *or any other equitable relief as the court deems appropriate*" (emphasis added). The scope of the relief that could have been entered on behalf of respondents had they prevailed at trial therefore depends on the nature of relief that is "appropriate" in remedying Title VII violations.

In determining the nature of "appropriate" relief under § 706(g), courts have distinguished between individual relief and race-conscious class relief. Although overlooked by the Court, this distinction is highly relevant here. In a Title VII class action of the type brought by respondents, an individual plaintiff is entitled to an award of individual relief only if he can establish that he was the victim of discrimination. That requirement grows out of the general equitable principles of "make whole" relief; an individual who has suffered no injury is not entitled to an individual award. See *Teamsters* v. *United States*, 431 U. S. 324, 347–348, 364–371 (1977). If victimization is shown, however, an individual is entitled to whatever retroactive seniority, backpay, and promotions are consistent with the statute's goal of making the victim whole. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 762–770 (1976).

In Title VII class actions, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be "appropriate" under § 706(g).[10] See *University of*

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[10] See *e. g.*, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017, 1027–1028 (CA1 1974), cert. denied, 421 U. S. 910 (1975); *Rios* v. *Enter-*

California Regents v. *Bakke,* 438 U. S. 265, 301–302 (1978) (opinion of POWELL, J.); *id.*, at 353, n. 28 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). The purpose of such relief is not to make whole any particular individual, but rather to remedy the present classwide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the classwide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. The relief may take many forms, but in class actions it frequently involves percentages—such as those contained in the 1980 consent decree between the city and respondents—that require race to be taken into account when an employer hires or promotes employees. The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted.

In the instant cases, respondents' request for a preliminary injunction did not include a request for individual awards of retroactive seniority—and, contrary to the implication of the Court's opinion, the District Court did not make any such

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prise Assn. Steamfitters Local 638, 501 F. 2d 622, 629 (CA2 1974); *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 174–177 (CA3 1977), cert. denied, 438 U. S. 915 (1978); *Chisholm* v. *United States Postal Service*, 665 F. 2d 482, 499 (CA4 1981); *United States* v. *City of Alexandria*, 614 F. 2d 1358, 1363–1366 (CA5 1980); *United States* v. *I. B. E. W., Local No. 38*, 428 F. 2d 144 (CA6), cert. denied, 400 U. S. 943 (1970); *United States* v. *City of Chicago*, 663 F. 2d 1354 (CA7 1981) (en banc); *Firefighters Institute* v. *City of St. Louis*, 616 F. 2d 350, 364 (CA8 1980), cert. denied, 452 U. S. 938 (1981); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 553–554 (CA9), cert. denied, 404 U. S. 984 (1971); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 944 (CA10 1979); *Thompson* v. *Sawyer*, 219 U. S. App. D. C. 393, 430, 678 F. 2d 257, 294 (1982).

awards. Rather, the District Court order required the city to conduct its layoffs in a race-conscious manner; specifically, the preliminary injunction prohibited the city from conducting layoffs that would "decrease the percentage of black[s]" in certain job categories. The city remained free to lay off any individual black so long as the percentage of black representation was maintained.

Because these cases arise out of a consent decree, and a trial on the merits has never taken place, it is of course impossible for the Court to know the extent and nature of any past discrimination by the city. For this reason, to the extent that the scope of appropriate relief would depend upon the facts found at trial, it is impossible to determine whether the relief provided by the preliminary injunction would have been appropriate following a trial on the merits. Nevertheless, the Court says that the preliminary injunction was inappropriate because, it concludes, respondents could not have obtained similar relief had their cases been litigated instead of settled by a consent decree.

The Court's conclusion does not follow logically from its own analysis. As the Court points out, the consent decree arose out of a Title VII suit brought by respondents alleging, *inter alia*, that the city had engaged in a pattern and practice of discrimination against members of the plaintiff class. Mr. Stotts, the named plaintiff, claimed that he and the class members that he represented had been denied promotions solely because of race, and that because of that discrimination, he and other members of the class had been denied their rightful rank in the Memphis Fire Department. See Complaint of Respondents in No. 82–229, ¶¶ 9 and 10, App. 10. Had respondents' case actually proceeded to trial, therefore, it would have involved the now familiar two-stage procedure established in *Teamsters* and *Franks*. The first stage would have been a trial to determine whether the city had engaged in unlawful discrimination; if so, the case would proceed to the second stage, during which the individual members of the class would have the opportunity to establish that they were victims of discrimination. *Teamsters*, 431 U. S., at 371, 375. The Court itself correctly indicates: "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." *Ante*, at 578–579. Were respondents to prevail at trial on their claims of discrimination, therefore, they would have been entitled to individual awards of relief, including appropriate retroactive seniority. Thus, even treating the District Court's preliminary injunction as if it granted individual awards of retroactive seniority to class members, it is relief that respondents might have obtained had they gone to trial instead of settling their claims of discrimination. Thus, the Court's conclusion is refuted by its own logic and by the very cases on which it relies to come to its result.[11]

For reasons never explained, the Court's opinion has focused entirely on what respondents have actually shown, instead of what they might have shown had trial ensued. It is improper and unfair to fault respondents for failing to show "that any of the blacks protected from layoff had been a victim of discrimination," *ante*, at 579, for the simple reason that the claims on which such a showing would have been made never went to trial. The whole point of the consent decree in these cases—and indeed the point of most Title VII consent decrees—is for both parties to avoid the time and expense of litigating the question of liability and identifying the victims of discrimination. In the instant consent decree, the city expressly denied having engaged in any discrimination at all. Nevertheless, the consent decree in these cases provided several persons with both promotions and backpay. By definition, all such relief went to persons never determined to be victims of discrimination, and the Court does not indicate that it means to suggest that the original consent decree in these cases was invalid. Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees. Such a result would be incongruous, given the Court's past statements that "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88, n. 14 (1981); see *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974).

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[11] The Court's opinion is sufficiently ambiguous to suggest another interpretation. The Court concludes that the preliminary injunction was improper because it gave respondents something they could not have obtained had they proved that "a pattern or practice of discrimination existed." *Ante*, at 579. It is possible, therefore, that the Court is suggesting that the limit on relief available under a consent decree is that which could be awarded if a plaintiff prevailed in "stage I" of a case but failed to proceed to "stage II" during which the plaintiff seeks to identify actual victims of discrimination. But the Court has failed to provide any support for this odd notion. The rationale underlying its opinion seems to be that the limit of the District Court's remedial power is that which could have been ordered following a trial on the alleged discrimination, not just the first stage of such a trial.

The Court's reliance on *Teamsters* is mistaken at a more general level as well, because *Teamsters* was concerned with individual relief, whereas these cases are concerned exclusively with classwide, race-conscious relief. *Teamsters* arose out of two pattern-or-practice suits filed by the Government alleging that a union and an employer had discriminated against minorities in hiring truckdrivers. Prior to a finding of liability, the Government entered into a consent decree in partial resolution of the suit. In that decree, the defendants agreed to a variety of race-conscious remedial actions, including a requirement that the company hire "one Negro or Spanish-surnamed person for every white person" until a certain percentage of minority representation was achieved. 431 U. S., at 330–331, n. 4. The decree did not settle the claims of individual class members, however, and allowed the individuals whom the court found to be victims of discrimination to seek whatever retroactive seniority was appropriate under Title VII. *Ibid.*

In *Teamsters*, therefore, all classwide claims had been settled before the case reached this Court. The case concerned only the problems of determining victims and the nature of appropriate individual relief. *Teamsters* did not consider the nature of appropriate affirmative class relief that would have been available had such relief not been provided in the consent decree between the parties. The issue in the present cases, as posed by the Court, is just the reverse. Respondents have not requested individual awards of seniority, and the preliminary injunction made none. Thus, the issue in these cases is the appropriate scope of classwide relief—an issue not present in *Teamsters* when that case came here. *Teamsters* therefore has little relevance for these cases.

The Court seeks to buttress its reliance on *Teamsters* by stressing on the last sentence of § 706(g). That sentence states that a court cannot order the "hiring, reinstatement, or promotion of an individual as an employee . . . if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. The nature of the Court's reliance on that sentence is unclear, however, because the Court states merely that the District Court "ignores" the "policy behind § 706(g)." *Ante*, at 582–583, 579. For several reasons, however, it appears that the Court relies on the policy of § 706(g) only in making a particularized conclusion concerning the relief granted in these cases, rather than a conclusion about the general availability of race-conscious remedies.

In discussing § 706(g), the Court relies on several passages from the legislative history of the Civil Rights Act of 1964 in which individual legislators stated their views that Title VII would not authorize the imposition of remedies based upon race. And while there are indications that many in Congress at the time opposed the use of race-conscious remedies, there is authority that supports a narrower interpretation of § 706(g). Under that interpretation, the last sentence of § 706(g) addresses only the situation in which a plaintiff demonstrates that an employer has engaged in unlawful discrimination, but the employer can show that a particular individual would not have received the job, promotion, or reinstatement even in the absence of discrimination because there was also a lawful justification for the action. See *Patterson* v. *Greenwood School District 50*, 696 F. 2d 293, 295 (CA4 1982); *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 174–177 (CA3 1977), cert. denied, 438 U. S. 915 (1978); *Day* v. *Mathews*, 174 U. S. App. D. C. 231, 233, 530 F. 2d 1083, 1085 (1976); *King* v. *Laborers Int'l Union, Local No. 818*, 443 F. 2d 273, 278–279 (CA6 1971). See also Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 Colum. L. Rev. 292 (1982). The provision, for example, prevents a court from granting relief where an employment decision is based in part upon race, but where the applicant is unqualified for the job for nondiscriminatory reasons. In that sense, the section merely prevents a court from ordering an employer to hire someone unqualified for the job, and has nothing to do with prospective classwide relief.

Much of the legislative history supports this view. What is now § 706(g) had its origin in § 707(e) of H. R. 7152, 88th Cong., 1st Sess. (1963). That original version prevented a court from granting relief to someone that had been refused employment, denied promotion, or discharged "for cause." The "for cause" provision presumably referred to what an employer must show to establish that a particular individual should not be given relief. That language was amended by replacing "for cause" with "for any reason other than discrimination on account of race, color, religion or national origin," which was the version of the sentence as passed by the House. The author of the original version and the amendment explained that the amendment's only purpose was to specify cause, and to clarify that a court cannot find a violation of the Act that is based upon facts other than unlawful discrimination. 110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler). There is no indication whatever that the amendment was intended to broaden its prohibition to include all forms of prospective race-conscious relief.

In any event, § 706(g) was amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 107. The legislative history of that amendment strongly supports the view that Congress endorsed the remedial use of race under Title VII. The amendment added language to the first sentence of § 706(g) to make clear the breadth of the remedial authority of the courts. As amended, the first sentence authorizes a court to order "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate.*" 42 U. S. C. § 2000e–5(g) (emphasized language added in 1972).

In addition, during consideration of the amendment, Congress specifically rejected an attempt to amend Title VII to *prohibit* the use of prospective race-conscious employment goals to remedy discrimination. Senator Ervin proposed an amendment to Title VII intended to prohibit Government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. 118 Cong. Rec. 1663–1664 (1972). Senator Javits led the debate against the amendment. *Id.*, at 1664–1676. Significantly, Senator Javits stressed that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. He referred repeatedly to court decisions ordering race-conscious remedies, and asked that two such decisions be printed in the Congressional Record. *Id.*, at 1665–1675.[12] He stated explicitly his view that "[w]hat this amendment seeks to do is to undo . . . those court decisions." *Id.*, at 1665. The amendment was rejected by a 2-to-1 margin. *Id.*, at 1676.

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[12] The two cases placed in the Congressional Record were *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (CA9) (a percentage goal for black participation in apprenticeship program as part of remedy for Title VII violation), cert. denied, 404 U. S. 984 (1971), and *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (CA3) (upheld lawfulness of a plan requiring contractors on federally assisted projects to adopt goals for minority employment), cert. denied, 404 U. S. 854 (1971). Senator Javits also noted the Justice Department's practice of seeking consent decrees in Title VII cases containing percentage hiring goals. 118 Cong. Rec. 1675 (1972).

With clear knowledge, therefore, of courts' use of race-conscious remedies to correct patterns of discrimination, the 1972 Congress rejected an attempt to amend Title VII to prohibit such remedies. In fact, the Conference Committee stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972). Relying on this legislative history of the 1972 amendment and other actions by the Executive and the courts, four Members of this Court, including the author of today's opinion, stated in *University of California Regents* v. *Bakke*, 438 U. S. 265, 353, n. 28 (1978): "Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race" (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). As has been observed, n. 10, *supra*, moreover, the Courts of Appeals are unanimously of the view that race-conscious remedies are not prohibited by Title VII. Because the Court's opinion does not even acknowledge this consensus, it seems clear that the Court's conclusion that the District Court "ignored the policy" of § 706(g) is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII.

IV

By dissenting, I do not mean glibly to suggest that the District Court's preliminary injunction necessarily was correct. Because it seems that the affected whites have no contractual rights that were breached by the city's modified layoff plan, the effect of the preliminary injunction was to shift the pain of the city's fiscal crisis onto innocent employees. This

Court has recognized before the difficulty of reconciling competing claims of innocent employees who themselves are neither the perpetrators of discrimination nor the victims of it. "In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters*, 431 U. S., at 375, quoting *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944). If the District Court's preliminary injunction was proper, it was because it correctly interpreted the original intent of the parties to the consent decree, and equitably enforced that intent in what admittedly was a zero-sum situation. If it was wrong, it was because it improperly interpreted the consent decree, or because a less painful way of reconciling the competing equities was within the court's power. In either case, the District Court's preliminary injunction terminated many months ago, and I regret the Court's insistence upon unnecessarily reviving a past controversy.

HAYFIELD NORTHERN RAILROAD CO., INC., ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1579. Argued February 21, 1984—Decided June 12, 1984

The Staggers Rail Act of 1980 amendments to the Interstate Commerce Act (Act) regulate the process by which rail carriers may abandon unprofitable lines and provide a mechanism for shippers to obtain continued service by purchasing lines or subsidizing their operation. Title 49 U. S. C. § 10905 governs the procedures to be followed when a person seeks to prevent an abandonment by purchasing the carrier's lines or by subsidizing the carrier's service. Appellee rail carrier filed an application with the Interstate Commerce Commission (ICC) seeking to abandon an unprofitable 44-mile line between a town in Iowa and a town in Minnesota. Several shippers in Minnesota opposed the abandonment of a 19.2-mile segment of the line in Minnesota. After an Administrative Law Judge ruled that appellee was entitled to abandon the entire line, the Minnesota shippers offered to subsidize operation of the 19.2-mile segment. But the shippers were dissatisfied with the price for subsidizing continued operation of the segment as determined by the ICC after the parties could not agree on the terms, and withdrew their offer. The ICC then granted appellee a certificate of abandonment for the entire line. In the meantime, appellee had contracted with the State of Iowa and various Iowa shippers to improve certain trackage in Iowa and for this purpose to use track from the abandoned line. The Minnesota shippers then formed appellant rail carrier (appellant), planning to use its authority under a Minnesota statute to condemn the 19.2-mile segment. Appellant thereafter filed suit in a Minnesota state court and obtained a temporary restraining order preventing appellee from removing track from that segment. Appellee removed the suit to Federal District Court and moved to dissolve the restraining order on the ground that the Staggers Rail Act amendments to the Act pre-empted the Minnesota condemnation statute. The District Court awarded summary judgment to appellee and dissolved the restraining order, and the Court of Appeals affirmed, holding that the Minnesota statute was pre-empted because it constituted an obstacle to the accomplishment of the congressional purpose behind the federal abandonment procedure.

Held: Appellant's proposed application of the Minnesota condemnation statute is not pre-empted by the Staggers Rail Act amendments to the Act. Pp. 627–637.

(a) The underlying rationale of § 10905 represents a continuation of Congress' efforts to accommodate the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines and shippers that are dependent upon continued rail service. Under prior law, carriers could negotiate with offerors in bad faith while waiting for the then 6-month negotiating period to elapse, thereby either extracting excessive prices from desperate shippers or abandoning their lines without agreeing on a purchase or subsidy. To counteract such bad-faith negotiating, § 10905 binds a carrier to the purchase or subsidy price determined by the ICC if the offeror and carrier cannot themselves come to terms. On the other hand, to reduce the costly delays associated with shipper opposition to proposed abandonments, § 10905 reduces the period required for resolving negotiations over offers from 6 months to 110 days. In contrast to the complicated structure of the Act, the Minnesota statute in question is simply a straightforward application of a State's power of eminent domain. Pp. 627–631.

(b) Federal regulation of railroad abandonments is not so pervasive as to make reasonable any inference that Congress left no room for state action on the subject. Congress has *not* "unmistakably ordained" that States may not exercise their traditional eminent domain power over abandoned railroad property; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of such property. Nor is there any indication that the subject matter of abandoned railroads is the sort that "permits no other conclusion" but that it is governed by federal and not state law. As indicated by the ICC's own interpretation of its regulatory authority, which interpretation is entitled to considerable deference, issuing a certificate of abandonment, as a general proposition, terminates the ICC's jurisdiction so that there is no merit to appellee's argument that the abandoned line in question cannot be properly viewed as ordinary real property because the line, even after abandonment, remains under the ICC's jurisdiction. Pp. 632–634.

(c) The application of the Minnesota condemnation statute in the circumstances of this case would not obstruct the accomplishment of § 10905's purpose of abbreviating the period during which a carrier is obligated to furnish financially burdensome service it seeks to escape through abandonment. State condemnation proceedings do not interfere with that purpose insofar as they *follow* abandonment. After the ICC has authorized abandonment, the carrier is relieved of the obligation to furnish rail service, and nothing in § 10905 indicates a federal interest in affording special protection to a carrier after that point. Nor would allowing appellant to bring condemnation proceedings after abandonment contravene the Act's overall purpose of making the railroad industry more efficient and productive. While the exercise of state condemnation authority would prevent appellee from removing property from the Minnesota segment in question and shifting it to higher-value uses elsewhere, and while the ICC has recognized opportunity costs as one factor to be considered in deciding whether to authorize abandonment, it does not follow that state condemnation authority thereby frustrates the federal abandonment scheme. Section 10905 is expressly designed to allow an offeror to *force* a carrier to forgo abandonment in favor of continued operation through subsidization or purchase, regardless of the opportunity costs entailed by the inability to shift its assets to higher-value uses. Alleviating the carrier's burden does not alter the economic reality that opportunity costs continue to be incurred; it merely shifts the incidence of those costs. In light of Congress' imposition of solutions that subordinate opportunity costs to other considerations, state condemnation authority is not pre-empted merely because it may frustrate the economically optimal use of rail assets. Moreover, application of the Minnesota law here would not interfere with § 10905's valuation procedure by allowing appellant to relitigate the price the ICC determined for the purchase or subsidy of appellee's lines. The purpose of the federal valuation scheme was to prevent carriers from frustrating bona fide subsidy or purchase offers through bad-faith negotiations, not to impose a blanket prohibition of all postabandonment efforts to obtain abandoned railroad property. Pp. 634–636.

693 F. 2d 819, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Robert S. Abdalian argued the cause for appellants. With him on the briefs were *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Gilbert S. Buffington,* Special Assistant Attorney General.

Mark I. Levy argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee* and *Deputy Solicitor General Bator.*

Anne E. Keating argued the cause for appellee. With her on the brief was *Thomas E. Glennon.**

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*A brief of *amici curiae* urging reversal was filed for the State of Arkansas et al. by *Bronson C. La Follette,* Attorney General of Wisconsin, JUSTICE MARSHALL delivered the opinion of the Court.

The Staggers Rail Act of 1980, which amended the Interstate Commerce Act,[1] regulates the process by which rail carriers may abandon unprofitable lines and provides a mechanism for shippers to obtain continued service by purchasing lines or subsidizing their operation. This case poses the question whether the Interstate Commerce Act, as amended, pre-empts a Minnesota eminent domain statute[2] used to condemn rail property after it has been abandoned pursuant to the amendments. The Court of Appeals for the Eighth Circuit held that the Act, as amended, pre-empted the state statute. 693 F. 2d 819 (1982). We disagree.

I

On January 30, 1981, appellee filed an application with the Interstate Commerce Commission (Commission) seeking permission to abandon a 44-mile rail line between Oelwein, Iowa, and Randolph, Minn. Appellee maintained that operation of the line imposed a serious financial strain on its resources. Several shippers in Minnesota (Shippers Group) opposed the abandonment of a 19.2-mile segment of the line that passed through Hayfield, Minn. (Hayfield segment). After an Administrative Law Judge ruled that appellee was entitled to abandon the entire 44-mile line, the Shippers Group, pursu-

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Charles D. Hoornstra, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Steve Clark* of Arkansas, *Charles M. Oberly III* of Delaware, *Jim Jones* of Idaho, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Erwin I. Kimmelman* of New Jersey, *Robert O. Wefald* of North Dakota, *Dave Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *John Eaton, Jr.*, of Vermont, *Kenneth O. Eikenberry* of Washington, and *A. G. McClintock* of Wyoming.

[1] Pub. L. 96–448, § 402, 94 Stat. 1941–1945, 49 U. S. C. §§ 10903–10906.

[2] Minn. Stat. § 222.27 (1982); *infra*, at 631 (quoting the text of the law). Many States have enacted similar statutes. See Brief for Appellants 5, n. 2 (citing statutes in 33 States).

ant to the Staggers Rail Act amendments, offered to subsidize operation of the Hayfield segment. See 49 U. S. C. § 10905(c).[3] When the parties could not agree on mutually acceptable terms, the Commission, at the request of the Shippers Group, determined the appropriate price for subsidizing continued operation of the line. See 49 U. S. C. § 10905(e). Dissatisfied with the Commission's determination, the Shippers Group withdrew its offer. See 49 U. S. C. § 10905(f)(2). Soon thereafter, the Commission granted a certificate of abandonment to appellee, *ibid.*, thereby relieving appellee of its federal obligation to supply rail service.

During the period that the Shippers Group was attempting to prevent the issuance of a certificate of abandonment, appellee entered into contracts with the State of Iowa and various Iowa shippers. These contracts involved improvements of certain trackage in Iowa. Appellee intended to fulfill these contracts by using the track from the abandoned line.

On March 31, 1982, members of the Shippers Group formed appellant Hayfield Northern Railroad Co., Inc. (hereafter appellant). Appellant planned to use the eminent domain authority vested in it by Minn. Stat. § 227.27 (1982) to condemn the Hayfield segment that appellee had abandoned. Appellant filed suit in state court and obtained a temporary restraining order preventing appellee from removing track from the Hayfield segment. Appellee immediately removed the suit to Federal District Court and moved to dissolve the restraining order on the ground that the Act, as amended, pre-empted the Minnesota condemnation statute. At this point, the State of Minnesota intervened in order to defend appellant's application of its condemnation law.

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[3] At the same time that the Shippers Group offered to subsidize continued rail service, it also appealed the decision authorizing abandonment. The Commission denied the appeal whereupon the Shippers Group filed a petition for review in the Court of Appeals. After unsuccessfully seeking a stay of the order permitting abandonment, the Shippers Group withdrew its petition for review. See 693 F. 2d. 819, 820 (1982).

The District Court awarded summary judgment to appellee and dissolved the restraining order. After granting a stay pending appeal, the Court of Appeals for the Eighth Circuit affirmed. 693 F. 2d 819 (1982). The Court of Appeals held that the Minnesota condemnation statute was pre-empted because it constituted an obstacle to the accomplishment of the congressional purpose behind the federal abandonment procedure. The Court of Appeals also dissolved its stay and remanded the case to the District Court for calculation of the damages incurred by appellee because of the delay. Following denial of rehearing by the Court of Appeals, we denied appellant's motion to stay the issuance of the Court of Appeals' mandate, 460 U. S. 1018 (1983), and subsequently noted probable jurisdiction, 464 U. S. 812 (1983).

II

Pre-emption doctrine stems from the Supremacy Clause of the United States Constitution[4] and invalidates any state law that contradicts or interferes with an Act of Congress. Pre-emption arises in a wide array of contexts, from circumstances in which federal and state laws are plainly contradictory to those in which the incompatibility between state and federal laws is discernible only through inference.[5] This case presents no issue of express pre-emption; nothing on the face of the Staggers Rail Act amendments explictly indicates whether Congress intended to pre-empt state authority over rail property after the Commission has authorized its abandonment. Therefore, in order to determine whether preemption is otherwise indicated, we must inquire more deeply into the intention of Congress and the scope of the pertinent state legislation. We turn, then, to the laws in dispute to ascertain their structure and purpose.

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[4] See U. S. Const., Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance therof . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824).

[5] Compare *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913) (invalidating state law directly conflicting with federal regulations), with *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971) (holding wrongful discharge action brought in state court precluded by pervasiveness of federal regulation in the area). See generally L. Tribe, American Constitutional Law 376–391 (1978).

Initially, the Interstate Commerce Act did not subject railroad abandonments to the jurisdiction of the Commission. See Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. Congress ceded authority over abandonments to the Commission in the Transportation Act of 1920, ch. 91, § 402(18)–(22), 41 Stat. 477–478. See *Chicago & N. W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 319–320 (1981). The Transportation Act prohibited a carrier from abandoning any portion of a line without first obtaining from the Commission a certificate of abandonment verifying that the future public convenience and necessity permitted the cessation of the carrier's rail service.

The abandonment procedure proved inadequate, however, because it lacked a specific timetable for the issuance of an abandonment certificate. Railroads consequently found themselves enmeshed in lengthy proceedings before the Commission, unable to unburden themselves promptly of unprofitable lines. See *Chicago & N. W. Transportation Co.* v. *United States*, 582 F. 2d 1043, 1045–1046 (CA7), cert. denied, 439 U. S. 1039 (1978); S. Rep. No. 94–499, p. 3 (1975). Congress enacted new legislation to provide railroads with a more expeditious abandonment process that would also be attentive to the interests of shippers and others who might be dependent upon the continuation of rail service on a particular line. See the Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act), Pub. L. 94–210, § 802, 90 Stat. 127, originally codified at 49 U. S. C. § 1a (1976 ed.) (subsequently recodified without substantive change at 49 U. S. C. § 10903 *et seq.*).

To alleviate the costly delays imposed upon railroads by protracted proceedings before the Commission, the 4–R Act provided a schedule to govern the abandonment process. See 49 U. S. C. §§ 1a(3), (4) (1976 ed.). At the same time, to afford opponents of an abandonment an opportunity to maintain rail service, the 4–R Act allowed abandonment to be delayed for up to six months if a financially responsible person offered to subsidize or purchase the line. § 1a(6)(a). It soon became clear, however, that further reforms would be required in order adequately to address both the need of railroads for an even more abbreviated method of abandonment and the need of shippers and communities to avoid the dislocations caused by abandonment.[6] As a consequence, Congress further amended the Interstate Commerce Act by enacting the Staggers Rail Act of 1980, Pub. L. 96–448, § 402, 94 Stat. 1941–1945, codified at 49 U. S. C. §§ 10903–10906.

The Staggers Rail Act amendment most pertinent to this case was the revision of § 10905. Entitled "Offers of financial assistance to avoid abandonment and discontinuance," § 10905 governs the procedures to be followed when a person seeks to prevent an abandonment by purchasing the carrier's lines or by subsidizing the carrier's service. Section 10905 provides that the Commission shall publish in the Federal Register its findings that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line and that "[w]ithin 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U. S. C. § 10905(c).[7] If the Commission finds within 15 days that the offeror is "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance." § 10905(d). If the offeror and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation . . . within 60 days," § 10905(e), and this decision "shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision." § 10905(f)(2). If the offer is withdrawn, "the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance." *Ibid.*

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[6] See generally Railroad Transportation Policy Act of 1979: Hearings on S. 1946 before the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979); Railroad Deregulation Act of 1979: Hearings on H. R. 4570 before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess (1979); Railroad Deregulation Act of 1979: Hearings on S. 796 before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess., pts. 1, 3 (1979).

The underlying rationale of § 10905 represents a continuation of Congress' efforts to accommodate the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines and shippers that are dependent upon continued rail service.[8] Under the 4–R Act, carriers could negotiate with offerors in bad faith while simply waiting for the 6-month negotiating period to elapse. By pursuing this course, carriers could either extract excessive prices from desperate shippers or abandon their lines without reaching an agreement on purchase or subsidy. See *Chicago & N. W. Transportation Co.* v. *United States*, 678 F. 2d 665, 667 (CA7 1982). To counteract bad-faith negotiating on the part of carriers, § 10905(f)(2) binds a carrier to the purchase or subsidy price determined by the Commission in the event that the offeror and the carrier cannot themselves come to terms. On the other hand, to reduce the costly delays associated with shipper opposition to proposed abandonments, § 10905 further abbreviates the period required for resolving negotiations over offers. Under the 4–R Act, the period for resolving such offers was six months; under § 402(c) of the Staggers Rail Act amendments, Congress reduced the period to 110 days.[9]

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[7] To enable potential offerors to determine the feasibility of subsidizing or purchasing a line, the Act mandates that a rail carrier applying for an abandonment certificate must provide current financial data, including an estimate of the annual subsidy and minimum purchase price needed to keep the line in operation. 49 U. S. C. § 10905(b).

[8] See S. Rep. No. 96–470, pp. 39–41 (1979) ("The abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing [abandonment] cases at the Commission and improving the process by which abandoned lines can be subsidized"); H. R. Conf. Rep. No. 96–1430, p. 125 (1980) (§ 10905 as amended will "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process").

In contrast to the complicated structure of the Interstate Commerce Act, the Minnesota statute at issue is a straightforward application of a State's familiar power of eminent domain. The statute, originally enacted in 1879, provides:

> "Every foreign and domestic railroad corporation shall have power to acquire, by purchase or condemnation, all necessary roadways, spur and side tracks, rights of way, depot grounds, yards, grounds for gravel pits, machine shops, warehouses, elevators, depots, station houses, and all other structures necessary or convenient for the use, operation, or enjoyment of the road, and may make with any other railroad company, such arrangements for the use of any portion of its tracks and roadbeds as it may deem necessary." Minn. Stat. § 222.27 (1982).

III

The argument that the Staggers Rail Act amendments pre-empt the State's power of eminent domain over the abandoned Hayfield segment rests upon two contentions: first, that the federal regulation of railroad abandonments is so pervasive as to make reasonable the inference that Congress left no room for state action on this subject; and, second, that application of the Minnesota statute in the circumstances of this case would pose an obstacle to the accomplishment of the purposes of § 10905.

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[9] Compare 49 U. S. C. § 1a(6)(a) (1976 ed.) with 49 U §§ 10905(c)–(f).

A

The first contention attempts to bring this case within the narrow ambit of decisions in which this Court has indicated that congressional legislation so occupied the field of a particular subject area that state regulation within that field would be improper no matter how well state law comported with the federal policies involved. Cf. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U. S. 190, 203–204 (1983). This Court has repeatedly affirmed, however, that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963). In this case, Congress has *not* "unmistakably ordained" that the States may not exercise their traditional power of eminent domain over railroad property that has been abandoned; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of abandoned railroad property. Nor is there any indication that the subject matter at issue here—abandoned railroad property—is of the sort that "permits no other conclusion" but that it is governed by federal and not state regulation. After all, state law normally governs the condemnation of ordinary real property.

Appellee insists that the line it abandoned cannot properly be viewed as ordinary real property because, even after abandonment has occurred, the line remains under the jurisdiction of the Commission. According to appellee, the elaborate procedural detail of the Act indicates that in addition to granting the Commission exclusive and plenary authority to regulate abandonment, the Act also "granted the Commission exclusive and plenary authority to provide for continuation of rail service via forced sale or subsidy following its authorization of abandonment." Brief for Appellee 21–22. This claim reflects a misunderstanding of the Act. With exceptions irrelevant to this case,[10] the provisions of the Act relate to requirements that must be met *before* the Commission will authorize an abandonment. Therefore, unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end.[11]

The proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction is strongly buttressed by the Commission's own interpretation of its regulatory authority. According to the Commission, "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are the matters subject to State law." *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I. C. C. 249, 261 (1981); see also *Chicago & N. W. Transportation Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, WI*, I. C. C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) (set forth in App. to Joint Supplemental Memorandum of Appellant and Appellant-Intervenor A-1, A-5); *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I. C. C. 132, 135 (1980) ("When a rail line has been fully abandoned, it is no longer [a] rail line and the transfer of the line is not subject to our jurisdiction" (footnote omitted)), aff'd *sub nom. Simmons* v. *ICC*, 225 U. S. App. D. C. 84, 697 F. 2d 326 (1982); *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I. C. C. 969, 972 (1981). The Commission's position, of course, is entitled to considerable deference since it represents the construction of a regulatory statute by the agency charged with the statute's enforcement. See, *e. g.*, *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U. S. 89, 97 (1983).

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[10] See, *e. g.*, 49 U. S. C. § 10906:

"If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes."

See also 49 U. S. C. § 10905(f)(4) (no purchaser of an abandoned line "may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale").

[11] This does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment. For example, if the Commission authorized an abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate service elsewhere, pre-emption would almost certainly invalidate a subsequent order by a state court barring such a transfer. Cf. *In re Boston & Maine Corp.*, 596 F. 2d 2, 5–7 (CA1 1979); *Texas & Pac. R. Co. Abandonment between San Martine and Rock House in Culberson, Texas,* 363 I. C. C. 666, 678–679 (1980). This problem is absent from the case at bar.

B

The second contention in support of a finding of pre-emption is that the Minnesota condemnation statute, applied in the manner which appellant proposes, would obstruct the accomplishment of the objectives for which Congress enacted § 10905. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) (pre-emption arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). More specifically, appellee maintains that if shippers are allowed to institute potentially lengthy condemnation proceedings against abandoned rail lines, the benefits of the 110-day time limit established by § 10905 will be lost.[12]

We are unpersuaded. The expedited process provided by § 10905 was intended to abbreviate the period during which a carrier is obligated to furnish financially burdensome service it seeks to escape through abandonment. State condemnation proceedings do not interfere with that purpose insofar as such proceedings *follow* abandonment. After the Commission has authorized a carrier to abandon its lines, that carrier is relieved of its obligation to furnish rail service. Nothing in § 10905 indicates a federal interest in affording special protection to a carrier after the point at which the carrier's federal obligation ends.[13]

Appellee also maintains that allowing appellant to bring condemnation proceedings after abandonment would contravene the overall purpose of the Act: to make the railroad industry more efficient and productive. It is true that the exercise of state condemnation authority would prevent appellee from removing property subject to that authority from the Hayfield segment and shifting such property to higher-value uses elsewhere. It is also true that the existence of opportunity costs has been recognized by the Commission as one factor to be taken into account in deciding whether to authorize an abandonment. See, *e. g.*, *State of Maine Dept. of Transportation* v. *ICC*, 587 F. 2d 541, 543–544 (CA1 1978). It does not follow however, that state condemnation authority thereby frustrates the federal abandonment scheme. What appellee overlooks is that § 10905 is expressly designed to allow an offeror to *force* a carrier to forgo abandonment in favor of continued operation through subsidization or purchase, regardless of the opportunity costs entailed by the inability to shift its assets to higher-value uses. See § 10905(f)(2). Offerors must be willing, of course, to subsidize or purchase the line so that the costs of continued operation are lifted from the carrier. § 10905(d). But alleviating the carrier's burden does not alter the economic reality that opportunity costs continue to be incurred; it merely shifts the incidence of those costs. In light of Congress' imposition of solutions that subordinate opportunity costs to other considerations, state condemnation authority is not pre-empted merely because it may frustrate the economically optimal use of rail assets.

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[12] According to the Court of Appeals "the benefits of the 110 day time schedule would be lost, since the state proceedings, once commenced, could take years." 693 F. 2d, at 822–823 (citation omitted).

[13] As the Conference Report on the Staggers Rail Act explained, one of the central aims of § 10905 was to "protec[t] carriers from protracted legal proceedings which are calculated merely to tediously extend *the abandonment process.*" H. R. Conf. Rep. No. 96–1430, p. 125 (1980) (emphasis added).

Finally, appellee maintains that appellant's proposed application of Minnesota law would interfere with the valuation procedure established by § 10905 by allowing appellant to relitigate the price the Commission established for the purchase or subsidizing of appellee's lines.[14] Although it may seem unfair to allow a shipper a "second bite at the apple" in state condemnation proceedings after it has participated in, and then withdrawn from, negotiations under § 10905, that second opportunity does not frustrate the purpose of the federal valuation scheme. That purpose was to prevent carriers from frustrating bona fide offers of subsidy or purchase through bad-faith negotiations, see *supra*, at 630–631, not to impose a blanket prohibition covering all postabandonment efforts to obtain abandoned property.[15]

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[14] The Court of Appeals accepted this argument and concluded that allowing appellant to use Minnesota law to condemn the Hayfield segment "would circumvent the Commission's determination of value." 693 F. 2d, at 823.

[15] The question whether appellant should be allowed to litigate the value of appellee's abandoned rail property is an issue more appropriately analyzed in terms of res judicata rather than pre-emption. If an offeror participates in a § 10905 proceeding and obtains an unfavorable valuation, the Commission's administrative determination may well have preclusive

IV

We hold that appellant's proposed application of Minnesota condemnation law is not pre-empted by the Staggers Act amendments to the Interstate Commerce Act. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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effect in state condemnation proceedings. See, *e. g.*, *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966) (administrative determinations usually have res judicata effect "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"). On the other hand, the 60-day limit within which the Commission must fix a price for purchase or subsidy, see 49 U. S. C. § 10905(f)(1)(A), may deprive the parties of the "adequate opportunity to litigate" required for the imposition of res judicata. We intimate no position on the issue inasmuch as it is not now before us.

Similarly, we leave open the issue whether state condemnation proceedings could, consistent with the purposes of the federal abandonment scheme, fix a lower valuation upon abandoned property than the valuation arrived at in prior § 10905 proceedings.

ARMCO INC. *v.* HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 83-297. Argued April 17, 1984—Decided June 12, 1984

West Virginia imposes a gross receipts tax on businesses selling tangible property at wholesale. Local manufacturers are exempt from the tax, but are subject to a higher manufacturing tax. Appellant is an Ohio corporation that manufactures and sells steel products and conducted business in West Virginia. It challenged the wholesale tax on the ground, *inter alia,* that the tax discriminated against interstate commerce because of the exemption granted to local manufacturers. Appellee State Tax Commissioner rejected the challenge. The Circuit Court reversed on other grounds, but in turn was reversed by the West Virginia Supreme Court of Appeals.

Held: The wholesale gross receipts tax unconstitutionally discriminates against interstate commerce. Pp. 642-646.

(a) Under the Commerce Clause, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. On its face, the wholesale tax has just that effect, since whether a wholesaler is subject to the tax depends upon whether it conducts manufacturing in the State or out of it. P. 642.

(b) The wholesale tax cannot be deemed a "compensating tax." Manufacturing and wholesaling are not "substantially equivalent events" such that the higher manufacturing tax can be said to compensate for the lighter burden placed on wholesalers from out of State by the wholesale tax. Pp. 642-643.

(c) Moreover, when the two taxes are considered together, discrimination against interstate commerce persists, since if Ohio or any other State imposes a like tax on its manufacturers, then appellant and others from out of State will pay both a manufacturing tax and a wholesale tax while West Virginia sellers will pay only the manufacturing tax. Appellant need not prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on in-state manufacturers. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the 49 other States' tax laws and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated. Cf. *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159. Pp. 644–645.

—— W. Va. ——, 303 S. E. 2d 706, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 646.

Richard R. Dailey argued the cause for appellant. With him on the briefs were *Edward H. Hein* and *Michael J. Rufkahr*.

Robert Digges, Jr., Assistant Attorney General of West Virginia, argued the cause for appellee. With him on the brief were *Chauncey H. Browning*, Attorney General, and *Jack C. McClung*, Deputy Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

In this appeal an Ohio corporation claims that West Virginia's wholesale gross receipts tax, from which local manufacturers are exempt, unconstitutionally discriminates against interstate commerce. We agree and reverse the state court's judgment upholding the tax.

I

Appellant Armco Inc. is an Ohio corporation qualified to do business in West Virginia. Its primary business is manufacturing and selling steel products. From 1970 through 1975, the time at issue here, Armco conducted business in West Virginia through five divisions or subdivisions. Two of these had facilities and employees in the State, while the other

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*Briefs of *amici curiae* urging affirmance were filed for the State of Washington by *Kenneth O. Eikenberry*, Attorney General, and *Leland T. Johnson* and *Timothy R. Malone*, Assistant Attorneys General; and for the National Conference of State Legislatures et al. by *Lawrence R. Velvel*, *Elaine D. Kaplan*, and *Stefan F. Tucker*.

three sold various products to customers in the State only through franchisees or nonresident traveling salesmen.[1]

West Virginia imposes a gross receipts tax on persons engaged in the business of selling tangible property at wholesale. W. Va. Code § 11–13–2c (1983).[2] For the years 1970 through 1975 Armco took the position that the gross receipts tax could not be imposed on the sales it made through franchisees and nonresident salesmen. In addition, because local manufacturers were exempt from the tax, see § 11–13–2,[3] Armco argued that the tax discriminated against interstate commerce. After a hearing, the State Tax Commissioner, who is appellee here, determined that the tax was properly assessed on the sales at issue, and that Armco had not shown the tax was discriminatory.[4] The Circuit Court of Kanawha County reversed, holding that the nexus between the sales and the State was insufficient to support imposition of the tax.

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[1] The company's Mining Division mined, cleaned, and sold coal in the State, and part of the Metal Products Division sold various construction and drainage products through an office in the State staffed by three employees. The Metal Products Division's metal buildings were sold in the State exclusively by two franchised dealers resident in the State. The Steel Group and the Union Wire Rope Group had no office in West Virginia but sold steel and wire rope through nonresident traveling salesmen who solicited sales from customers in the State.

[2] For the years 1971 through 1975, § 11–13–2c provided, in relevant part:

"Upon every person engaging or continuing within this state in the business of selling any tangible property whatsoever, real or personal, . . . there is . . . hereby levied, and shall be collected, a tax equivalent to fifty-five one-hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one-hundredths of one percent of the gross income of the business." 1971 W. Va. Acts, ch. 169.

The tax on wholesale gross receipts was 0.25% prior to 1971. 1959 W. Va. Acts, ch. 167.

[3] West Virginia Code § 11–13–2 (1983) provides an exemption for persons engaged in the State in manufacturing or in extracting natural resources, and selling their products. For the years at issue here, it read as follows, in relevant part:

"[A]ny person exercising any privilege taxable under sections two-a [extracting and producing natural resources for sale] or two-b [manufacturing] of this article and engaging in the business of selling his natural resources or manufactured products . . . to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§ 11–13–2c] of this article." 1955 W. Va. Acts, ch. 165, § 2; 1971 W. Va. Acts, ch. 169.

The West Virginia Supreme Court of Appeals reversed the Circuit Court and upheld the tax. —— W. Va. ——, 303 S. E. 2d 706 (1983). Viewing all of Armco's activities in the State as a "unitary business," the court held that the taxpayer had a substantial nexus with the State and that the taxpayer's total tax was fairly related to the services and benefits provided to Armco by the State. *Id.*, at ——, ——, 303 S. E. 2d, at 714, 716. It also held that the tax did not discriminate against interstate commerce; while local manufacturers making sales in the State were exempt from the gross receipts tax, they paid a much higher manufacturing tax.[5] *Id.*, at ——, ——, 303 S. E. 2d, at 716–717.

We noted probable jurisdiction, 464 U. S. 1016 (1983), and now reverse. Since we hold that West Virginia's tax does discriminate unconstitutionally against interstate commerce, we do not reach Armco's argument that there was not a sufficient nexus between the State and the sales at issue here to permit taxation of them.

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[4] The Commissioner waived statutory penalties on the disputed amount because he found that Armco's objections were a "good faith effort to interpret a substantial question of law." App. to Juris. Statement 49a.

[5] West Virginia Code § 11–13–2b (1983) imposes a manufacturing tax of 0.88% on the value of products manufactured in the State. The value of the product is measured by the gross proceeds derived from its sale. If the product is manufactured in part out of State, the sale price is multiplied by that portion of the manufacturer's payroll costs or total costs attributable to West Virginia. As relevant here, the tax is imposed on "every person engaging or continuing within this state in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, . . . any article . . . substance or . . . commodity." Prior to 1971, the tax rate was 0.8%. 1967 W. Va. Acts, ch. 188; see 1971 W. Va. Acts, ch. 169.

II

It long has been established that the Commerce Clause of its own force protects free trade among the States. *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977); *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946). One aspect of this protection is that a State "may not discriminate between transactions on the basis of some interstate element." *Boston Stock Exchange, supra*, at 332, n. 12. That is, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.

On its face, the gross receipts tax at issue here appears to have just this effect. The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp.* v. *Washington*, 377 U. S. 436, 459 (1964) (Goldberg, J., dissenting) (similar provision in Washington, "on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers"); *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 664, 192 P. 2d 976, 979 (1948) (invalidating Washington tax).

The court below was of the view that no such discrimination in favor of local, intrastate commerce occurred because taxpayers manufacturing in the State were subject to a far higher tax of 0.88% of the sale price. This view is mistaken. The gross sales tax imposed on Armco cannot be deemed a "compensating tax" for the manufacturing tax imposed on its West Virginia competitors. In *Maryland* v. *Louisiana*, 451 U. S. 725, 758–759 (1981), the Court refused to consider a tax on the first use in Louisiana of gas brought in from out of

State to be a complement of a severance tax in the same amount imposed on gas produced in the State. Severance and first use or processing were not "substantially equivalent event[s]" on which compensating taxes might be imposed. *Id.*, at 759. Here, too, manufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales.[6] The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.[7]

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[6] One would expect that a manufacturing tax might be larger than a gross receipts tax since an in-state manufacturer normally benefits to a greater extent from services provided by the State than does a transient wholesaler. Cf. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977) (state tax will be upheld if it is "fairly related to the services provided by the State").

[7] The court below relied upon *Alaska* v. *Arctic Maid*, 366 U. S. 199 (1961). That case does not control because the statute there merely laid a nondiscriminatory tax on a particular kind of business, operating freezer ships in Alaska. This was deemed a different business from operating a cannery in Alaska, on which a different (in fact, higher) tax was imposed. See *id.*, at 205. There is no dispute that Armco and the exempt West Virginia manufacturers operate in precisely the same business of wholesaling in that State. That an exemption is required to ensure that the gross receipts tax will not apply to the latter makes this clear. The same is true of *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 119–120, 121 (1941). The latter case in any event was decided under the now rejected notion that only "direct" burdens on interstate commerce were disapproved, while "indirect" burdens that were the result of taxation of intrastate commerce were constitutional. See *id.*, at 120, and n. 4; *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734,

Moreover, when the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax. For example, if Ohio were to adopt the precise scheme here, then an interstate seller would pay the manufacturing tax of 0.88% *and* the gross receipts tax of 0.27%; a purely intrastate seller would pay only the manufacturing tax of 0.88% and would be exempt from the gross receipts tax.

Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test. In *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 169 (1983), the Court noted that a tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. See also *id.*, at 170–171. Any other rule would mean that the constitutionality of West Vir-

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750 (1978). This distinction also appears to have governed the definition of the business in which the taxpayer was engaged.

We acknowledge our recent dismissal for want of a substantial federal question of a case raising, *inter alia*, a nearly identical challenge to the West Virginia gross receipts tax. *Columbia Gas Transmission Corp.* v. *Rose*, 459 U. S. 807 (1982). We may find it necessary not to follow such a precedent when the issue is given plenary consideration. See, *e. g.*, *Caban* v. *Mohammed*, 441 U. S. 380, 390, n. 9 (1979).

ginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.[8]

It is true, as the State of Washington appearing as *amicus curiae* points out, that Armco would be faced with the same situation that it complains of here if Ohio (or some other State) imposed a tax only upon manufacturing, while West Virginia imposed a tax only upon wholesaling. In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business. What we said in *Boston Stock Exchange*, 429 U. S., at 336–337, is relevant here as well:

> "Our decision today does not prevent the States from structuring their tax systems to encourage the growth

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[8] What was said in a related context is relevant:

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946).

The court in *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 662–664, 192 P. 2d 976, 978–979 (1948), found this language dispositive in invalidating a Washington tax scheme identical to that here. See also *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64, 72 (1963) (deleterious effects on free commerce of Louisiana's tax would be exacerbated "[i]f similar unequal tax structures were adopted in other States").

> and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State."

The judgment below is reversed.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The Court today strikes down West Virginia's wholesale gross receipts tax, finding that the wholesale tax unconstitutionally discriminates against interstate commerce, because local manufacturers are granted an exemption from the wholesale tax if they pay a manufacturing tax on their gross manufacturing receipts. Appellant's arguments, however, effectively rest on the hypothetical burden it might face if another State levied a corresponding tax on its manufacturers. Because appellant has not shown that the taxes paid by out-of-state wholesalers on the same goods are higher than the taxes paid by in-state manufacturer-wholesalers, I would affirm the decision below. It is plain that West Virginia's tax would be unconstitutionally discriminatory if it levied no tax on manufacturing or taxed manufacturing at a lower rate than wholesaling, for then the out-of-state wholesaler would be paying a higher tax than the in-state manufacturer-wholesaler. But that is not the case here. Instead, a manufacturer selling his products at wholesale in West Virginia pays a much higher overall tax rate than the out-of-state wholesaler. The Court dismisses that fact, asserting that because in-state manufacturers formally pay no wholesale tax, the taxing scheme is facially discriminatory. The Court also rejects the possibility that West Virginia's manufacturing tax incorporates the tax otherwise levied on wholesale sales.

Neither of these reasons, in my view, supports invalidating the State's wholesale tax scheme. Our prior decisions indicate that when considering whether a tax is discriminatory, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64, 70 (1963) (footnote omitted). See also *Maryland* v. *Louisiana*, 451 U. S. 725, 756 (1981) (state tax must be examined for practical effect). Examining the State's tax structure as a whole, see *Washington* v. *United States*, 460 U. S. 536, 545–546 (1983), it is plain that West Virginia has not created a tax granting a direct commercial advantage to local businesses. See *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 329 (1977) (transfer tax on local stock sales one-half the rate imposed on out-of-state sales). Under West Virginia's taxing scheme, in-state manufacturer-wholesalers pay a tax rate of 0.88% on the value of the manufactured product, while out-of-state wholesalers pay only a 0.27% tax on the wholesale value. Thus, at the wholesale level at which appellant competes with in-state manufactured goods, it is quite likely that appellant pays much less in state taxes than any in-state manufacturer-wholesaler. This fact, in my view, suffices to rebut appellant's argument that the State's wholesale tax discriminates against interstate trade. Cf. *Washington* v. *United States*, *supra*, at 541–542 (Federal Government and federal contractors pay less tax than local contractors); *Alaska* v. *Arctic Maid*, 366 U. S. 199, 204 (1961) (local fish processors paid higher tax).*

The Court also justifies its decision on the ground that if Ohio, or any State where appellant may manufacture products sold in West Virginia, imposed a manufacturing tax,

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*Admittedly, because the tax paid by manufacturers is imposed on the manufactured value, while wholesalers pay a tax on the wholesale value, it is theoretically possible for appellant to pay a higher amount of tax than an in-state manufacturer. For this to happen, however, the wholesale value would have to be more than three and one-quarter times the manufactured value. In normal practice this price differential would seem unlikely. In any event, appellant has failed to show that it in fact pays a higher tax than an in-state manufacturer. Cf. *General Motors Corp.* v. *Washington*, 377 U. S. 436, 448–449 (1964).

appellant might possibly pay more taxes on its goods sold in West Virginia than a local manufacturer. But appellant has not demonstrated that it in fact has a higher tax burden in West Virginia solely by reason of interstate commerce. The Court sidesteps that fact, however, by borrowing a concept employed in our net income tax cases. Under that line of cases a state tax must have an internal consistency that takes into consideration the impact on interstate commerce if other jurisdictions employed the same tax. See *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 169 (1983). It is perfectly proper to examine a State's net income tax system for hypothethical burdens on interstate commerce. Nevertheless, that form of analysis is irrelevant to examining the validity of a gross receipts tax system based on manufacturing or wholesale transactions. Where a State's taxes are linked exactly to the activities taxed, it should be unnecessary to examine a hypothetical taxing scheme to see if interstate commerce would be unduly burdened. See *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S. 560, 564 (1975); cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 617 (1981).

The Court's analysis also employs a formalism I thought we had generally abandoned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 288–289, n. 15 (1977), where we rejected the *per se* rule and the administrative convenience that attended our former holding in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951). I would apply a similarly realistic approach to this case and uphold West Virginia's wholesale tax scheme.

NEW YORK *v.* QUARLES

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 82-1213. Argued January 18, 1984—Decided June 12, 1984

Respondent was charged in a New York state court with criminal possession of a weapon. The record showed that a woman approached two police officers who were on road patrol, told them that she had just been raped, described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. While one of the officers radioed for assistance, the other (Officer Kraft) entered the store and spotted respondent, who matched the description given by the woman. Respondent ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun but lost sight of him for several seconds. Upon regaining sight of respondent, Officer Kraft ordered him to stop and put his hands over his head; frisked him and discovered that he was wearing an empty shoulder holster; and, after handcuffing him, asked him where the gun was. Respondent nodded toward some empty cartons and responded that "the gun is over there." Officer Kraft then retrieved the gun from one of the cartons, formally arrested respondent, and read him his rights under *Miranda* v. *Arizona*, 384 U. S. 436. Respondent indicated that he would answer questions without an attorney being present and admitted that he owned the gun and had purchased it in Florida. The trial court excluded respondent's initial statement and the gun because the respondent had not yet been given the *Miranda* warnings, and also excluded respondent's other statements as evidence tainted by the *Miranda* violation. Both the Appellate Division of the New York Supreme Court and the New York Court of Appeals affirmed.

Held: The Court of Appeals erred in affirming the exclusion of respondent's initial statement and the gun because of Officer Kraft's failure to read respondent his *Miranda* rights before attempting to locate the weapon. Accordingly, it also erred in affirming the exclusion of respondent's subsequent statements as illegal fruits of the *Miranda* violation. This case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*. Pp. 653-660.

(a) Although respondent was in police custody when he made his statements and the facts come within the ambit of *Miranda*, nevertheless on these facts there is a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved. The doctrinal underpinnings of *Miranda* do not require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. In this case, so long as the gun was concealed somewhere in the supermarket, it posed more than one danger to the public safety: an accomplice might make use of it, or a customer or employee might later come upon it. Pp. 655–657.

(b) Procedural safeguards that deter a suspect from responding, and increase the possibility of fewer convictions, were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege against compulsory self-incrimination. However, if *Miranda* warnings had deterred responses to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting respondent. An answer was needed to insure that future danger to the public did not result from the concealment of the gun in a public area. P. 657.

(c) The narrow exception to the *Miranda* rule recognized here will to some degree lessen the desirable clarity of that rule. However, the exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. Police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect. Pp. 658–659.

58 N. Y. 2d 664, 444 N. E. 2d 984, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 660. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 674.

Steven J. Rappaport argued the cause for petitioner. With him on the briefs were *John J. Santucci* and *Richard G. Denzer*.

David A. Strauss argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Steven J. Hyman argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Benjamin Quarles was charged in the New York trial court with criminal possession of a weapon. The trial court suppressed the gun in question, and a statement made by respondent, because the statement was obtained by police before they read respondent his "*Miranda* rights." That ruling was affirmed on appeal through the New York Court of Appeals. We granted certiorari, 461 U. S. 942 (1983), and we now reverse.[1] We conclude that under the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon.

On September 11, 1980, at approximately 12:30 a. m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, N. Y., when a young woman approached their car. She told them that she had just been raped by a black male, approximately six feet tall, who was wearing a black jacket with the name "Big Ben" printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.

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[1] Although respondent has yet to be tried in state court, the suppression ruling challenged herein is a "final judgment" within the meaning of 28 U. S. C. § 1257(3), and we have jurisdiction over this case. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975), we identified four categories of cases where the Court will treat a decision of the highest state court as final for § 1257 purposes even though further proceedings are anticipated in the lower state courts. This case, which comes to this Court in the same posture as *Michigan* v. *Clifford*, 464 U. S. 287 (1984), decided earlier this Term, falls within the category which includes "those situations where the federal claim has been finally decided . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U. S., at 481. In this case should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal. See *California* v. *Stewart*, 384 U. S. 436, 498, n. 71 (1966) (decided with *Miranda* v. *Arizona*).

The officers drove the woman to the supermarket, and Officer Kraft entered the store while Officer Scarring radioed for assistance. Officer Kraft quickly spotted respondent, who matched the description given by the woman, approaching a checkout counter. Apparently upon seeing the officer, respondent turned and ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun. When respondent turned the corner at the end of an aisle, Officer Kraft lost sight of him for several seconds, and upon regaining sight of respondent, ordered him to stop and put his hands over his head.

Although more than three other officers had arrived on the scene by that time, Officer Kraft was the first to reach respondent. He frisked him and discovered that he was wearing a shoulder holster which was then empty. After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, "the gun is over there." Officer Kraft thereafter retrieved a loaded .38-caliber revolver from one of the cartons, formally placed respondent under arrest, and read him his *Miranda* rights from a printed card. Respondent indicated that he would be willing to answer questions without an attorney present. Officer Kraft then asked respondent if he owned the gun and where he had purchased it. Respondent answered that he did own it and that he had purchased it in Miami, Fla.

In the subsequent prosecution of respondent for criminal possession of a weapon,[2] the judge excluded the statement, "the gun is over there," and the gun because the officer had not given respondent the warnings required by our decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), before asking him where the gun was located. The judge excluded the other statements about respondent's ownership of the gun and the place of purchase, as evidence tainted by the prior *Miranda* violation. The Appellate Division of the Supreme Court of New York affirmed without opinion. 85 App. Div. 2d 936, 447 N. Y. S. 2d 84 (1981).

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[2] The State originally charged respondent with rape, but the record provides no information as to why the State failed to pursue that charge.

The Court of Appeals granted leave to appeal and affirmed by a 4–3 vote. 58 N. Y. 2d 664, 444 N. E. 2d 984 (1982). It concluded that respondent was in "custody" within the meaning of *Miranda* during all questioning and rejected the State's argument that the exigencies of the situation justified Officer Kraft's failure to read respondent his *Miranda* rights until after he had located the gun. The court declined to recognize an exigency exception to the usual requirements of *Miranda* because it found no indication from Officer Kraft's testimony at the suppression hearing that his subjective motivation in asking the question was to protect his own safety or the safety of the public. 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985. For the reasons which follow, we believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda.*[3]

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[3] We have long recognized an exigent-circumstances exception to the warrant requirement in the Fourth Amendment context. See, *e. g.*, *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978); *Warden* v. *Hayden*, 387 U. S. 294, 298–300 (1967); *Johnson* v. *United States*, 333 U. S. 10, 14–15 (1948). We have found the warrant requirement of the Fourth Amendment inapplicable in cases where the " 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978), quoting *McDonald* v. *United States*, 335 U. S. 451, 456 (1948). Although "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness," *Fisher* v. *United States*, 425 U. S. 391, 400 (1976), we conclude today that there are limited circumstances where the judicially imposed strictures of *Miranda* are inapplicable.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. 384 U. S., at 460–461, 467. The Fifth Amendment itself does not prohibit all incriminating admissions; "[a]bsent some officially *coerced* self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U. S. 181, 187 (1977) (emphasis added). The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances[4] is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974); see *Edwards* v. *Arizona*, 451 U. S. 477, 492 (1981) (POWELL, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right. *Michigan* v. *Tucker*, *supra*, at 444.

In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist. See *Beckwith* v. *United States*, 425 U. S. 341, 347–348 (1976); *Davis* v. *North Carolina*, 384 U. S. 737 (1966). Thus the only issue before us is whether

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[4] *Miranda* on its facts applies to station house questioning, but we have not so limited it in our subsequent cases, often over strong dissent. See, *e. g.*, *Rhode Island* v. *Innis*, 446 U. S. 291 (1980) (police car); *Orozco* v. *Texas*, 394 U. S. 324 (1969) (defendant's bedroom); *Mathis* v. *United States*, 391 U. S. 1 (1968) (prison cell during defendant's sentence for an unrelated offense); but see *Orozco* v. *Texas*, *supra*, at 328–331 (WHITE, J., dissenting).

Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*.[5]

The New York Court of Appeals was undoubtedly correct in deciding that the facts of this case come within the ambit of the *Miranda* decision as we have subsequently interpreted it. We agree that respondent was in police custody because we have noted that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest," *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)*, quoting *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam)*. Here Quarles was surrounded by at least four police officers and was handcuffed when the questioning at issue took place. As the New York Court of Appeals observed, there was nothing to suggest that any of the officers were any longer concerned for their own physical safety. 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985. The New York Court of Appeals' majority declined to express an opinion as to whether there might be an exception to the *Miranda* rule if the police had been acting to protect the public, because the lower courts in New York had made no factual determination that the police had acted with that motive. *Ibid.*

We hold that on these facts there is a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.[6] Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

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[5] The dissent curiously takes us to task for "endors[ing] the introduction of coerced self-incriminating statements in criminal prosecutions," *post*, at 674, and for "sanction[ing] *sub silentio* criminal prosecutions based on compelled self-incriminating statements." *Post*, at 686. Of course our decision today does nothing of the kind. As the *Miranda* Court itself recognized, the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary, *Miranda* v. *Arizona*, 384 U. S., at 457, and respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards. Today we merely reject the only argument that respondent has raised to support the exclusion of his statement, that the statement must be *presumed* compelled because of Officer Kraft's failure to read him his *Miranda* warnings.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. The *Miranda* decision was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house. 384 U. S., at 455–458. The dissenters warned that the requirement of *Miranda* warnings would have the effect of decreasing the number of suspects who respond to police questioning. *Id.*, at 504, 516–517 (Harlan, J., joined by Stewart and WHITE, JJ., dissenting). The *Miranda* majority, however, apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege.

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[6] Similar approaches have been rejected in other contexts. See *Rhode Island* v. *Innis*, *supra*, at 301 (officer's subjective intent to incriminate not determinative of whether "interrogation" occurred); *United States* v. *Mendenhall*, 446 U. S. 544, 554, and n. 6 (1980) (opinion of Stewart, J.) (officer's subjective intent to detain not determinative of whether a "seizure" occurred within the meaning of the Fourth Amendment); *United States* v. *Robinson*, 414 U. S. 218, 236, and n. 7 (1973) (officer's subjective fear not determinative of necessity for "search incident to arrest" exception to the Fourth Amendment warrant requirement).

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibilty of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.[7]

In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our *Miranda* holding. See, *e. g.*, *Minnesota* v. *Murphy*, 465 U. S. 420 (1984) (refusal to extend *Miranda* requirements to interviews with probation officers); *Fare* v. *Michael C.*, 442 U. S. 707 (1979) (refusal to equate request to see a probation officer with request to see a lawyer for *Miranda* purposes); *Beckwith* v. *United States*, 425 U. S. 341 (1976) (refusal to extend *Miranda* requirements to questioning in noncustodial circumstances). As we have in other contexts, we recognize here the importance of a workable rule "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979). But as we have pointed out, we believe that the exception which we recognize today lessens the necessity of that on-the-scene balancing process. The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.

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[7] The dissent argues that a public safety exception to *Miranda* is unnecessary because in every case an officer can simply ask the necessary questions to protect himself or the public, and then the prosecution can decline to introduce any incriminating responses at a subsequent trial. *Post*, at 686. But absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind; and we do not believe that the doctrinal underpinnings of *Miranda* require us to exclude the evidence, thus penalizing officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public.

The facts of this case clearly demonstrate that distinction and an officer's ability to recognize it. Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings that he continued with investigatory questions about the ownership and place of purchase of the gun. The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety.[8]

We hold that the Court of Appeals in this case erred in excluding the statement, "the gun is over there," and the gun because of the officer's failure to read respondent his *Miranda* rights before attempting to locate the weapon. Accordingly we hold that it also erred in excluding the subsequent statements as illegal fruits of a *Miranda* violation.[9] We therefore reverse and remand for further proceedings not inconsistent with this opinion.

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[8] Although it involves police questions in part relating to the whereabouts of a gun, *Orozco* v. *Texas*, 394 U. S. 324 (1969), is in no sense inconsistent with our disposition of this case. In *Orozco* four hours after a murder had been committed at a restaurant, four police officers entered the defendant's boardinghouse and awakened the defendant, who was sleeping in his bedroom. Without giving him *Miranda* warnings, they began vigorously to interrogate him about whether he had been present at the scene of the shooting and whether he owned a gun. The defendant eventually admitted that he had been present at the scene and directed the officers to a washing machine in the backroom of the boardinghouse where he had hidden the gun. We held that all the statements should have been suppressed. In *Orozco*, however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.

Rhode Island v. *Innis*, 446 U. S. 291 (1980), also involved the whereabouts of a missing weapon, but our holding in that case depended entirely on our conclusion that no police interrogation took place so as to require consideration of the applicability of the *Miranda* prophylactic.

It is so ordered.

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court held unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it. Today, the Court concludes that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of such warnings. *Ante*, at 657–658. In so holding, the Court acknowledges that it is departing from prior precedent, see *ante*, at 653, and that it is "lessen[ing] the desirable clarity of [the *Miranda*] rule," *ante*, at 658. Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures. Accordingly, I would require suppression of the initial statement taken from respondent in this case. On the other hand, nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree with the Court that admission of the gun in evidence is proper.[1]

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[9] Because we hold that there is no violation of *Miranda* in this case, we have no occasion to reach arguments made by the State and the United States as *amicus curiae* that the gun is admissible either because it is nontestimonial or because the police would inevitably have discovered it absent their questioning.

[1] As to the statements elicited after the *Miranda* warnings were administered, admission should turn solely on whether the answers received were voluntary. See *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966). In this

I

Prior to *Miranda*, the privilege against self-incrimination had not been applied to an accused's statements secured during custodial police interrogation. In these circumstances, the issue of admissibility turned, not on whether the accused had waived his privilege against self-incrimination, but on whether his statements were "voluntary" within the meaning of the Due Process Clause. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1936). Under this approach, the "totality of the circumstances" were assessed. If the interrogation was deemed unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice, the statements received would be inadmissible.

The *Miranda* Court for the first time made the Self-Incrimination Clause applicable to responses induced by informal custodial police interrogation, thereby requiring suppression of many admissions that, under traditional due process principles, would have been admissible. More specifically, the Court held that

> "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of

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case, the state courts made no express finding concerning the voluntariness of the statements made, because they thought the answers received had to be suppressed as "fruit" of the initial failure to administer *Miranda* warnings. App. 43a–44a; 58 N. Y. 2d 644, 666, 444 N. E. 2d 984, 985 (1982). Whether the mere failure to administer *Miranda* warnings can "taint" subsequent admissions is an open question, compare *United States* v. *Toral*, 536 F. 2d 893, 896–897 (CA9 1976), with *Oregon* v. *Elstad*, 61 Ore. App. 673, 658 P. 2d 552 (1983), cert. granted, 465 U. S. 1078 (1984), but a proper inquiry must focus at least initially, if not exclusively, on whether the subsequent confession is *itself* free of actual coercion. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 603 (1944). I would reverse and remand for further factual findings on this issue.

> procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* v. *Arizona*, 384 U. S., at 444.

Those safeguards included the now familiar *Miranda* warnings—namely, that the defendant must be informed

> "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479.

The defendant could waive these rights, but any waiver had to be made "knowingly and intelligently," *id.*, at 475, and the burden was placed on the prosecution to prove that such a waiver had voluntarily been made. *Ibid.* If the *Miranda* warnings were not properly administered or if no valid waiver could be shown, then all responses to interrogation made by the accused "while in custody . . . or otherwise deprived of his freedom of action in any significant way" were to be presumed coerced and excluded from evidence at trial. *Id.*, at 476, 479.

The *Miranda* Court itself considered objections akin to those raised by the Court today. In dissent, JUSTICE WHITE protested that the *Miranda* rules would "operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved." *Id.*, at 544. But the *Miranda* Court would not accept any suggestion that "society's need for interrogation [could] outweig[h] the privilege." To that Court, the privilege against self-incrimination was absolute and therefore could not be "abridged." *Id.*, at 479.

Since the time *Miranda* was decided, the Court has repeatedly refused to bend the literal terms of that decision. To be sure, the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way. See, *e. g., California* v. *Beheler,* 463 U. S. 1121 (1983) *(per curiam); Oregon* v. *Mathiason,* 429 U. S. 492 (1977); *Beckwith* v. *United States,* 425 U. S. 341 (1976); *Michigan* v. *Mosley,* 423 U. S. 96 (1975); but cf. *Edwards* v. *Arizona,* 451 U. S. 477 (1981). Similarly, where "statements taken in violation of the *Miranda* principles [have] not be[en] used to prove the prosecution's case at trial," the Court has allowed evidence derived from those statements to be admitted. *Michigan* v. *Tucker,* 417 U. S. 433, 445 (1974). But wherever an accused has been taken into "custody" and subjected to "interrogation" without warnings, the Court has consistently prohibited the use of his responses for prosecutorial purposes at trial. See, *e. g., Estelle* v. *Smith,* 451 U. S. 454 (1981); *Orozco* v. *Texas,* 394 U. S. 324 (1969); *Mathis* v. *United States,* 391 U. S. 1 (1968); cf. *Harris* v. *New York,* 401 U. S. 222 (1971) (statements may be used for impeachment purposes). As a consequence, the "meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island* v. *Innis,* 446 U. S. 291, 304 (1980) (BURGER, C. J., concurring); see generally Stephens, Flanders, & Cannon, Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements, 39 Tenn. L. Rev. 407 (1972).

In my view, a "public safety" exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand. In some cases, police will benefit because a reviewing court will find that an exigency excused their failure to administer the required warnings. But in other cases, police will suffer because, though they thought an exigency excused their noncompliance, a reviewing court will view the "objective" circumstances differently and require exclusion of admissions thereby obtained. The end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence. "While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, . . . that rigidity [has also been called a] strength of the decision. It [has] afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. . . . [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely [ignored] by . . . courts under the guise of [reinterpreting] *Miranda* . . . ." *Fare* v. *Michael C.*, 439 U. S. 1310, 1314 (1978) (REHNQUIST, J., in chambers on application for stay).

The justification the Court provides for upsetting the equilibrium that has finally been achieved—that police cannot and should not balance considerations of public safety against the individual's interest in avoiding compulsory testimonial self-incrimination—really misses the critical question to be decided. See *ante*, at 657–658. *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State. When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial. See *Michigan* v. *Tucker*, *supra*, at 445, 447–448, 451, 452, and n. 26; *Orozco* v. *Texas*, *supra*, at 326.

The Court concedes, as it must, both that respondent was in "custody" and subject to "interrogation" and that his statement "the gun is over there" was compelled within the meaning of our precedent. See *ante*, at 654–655. In my view, since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that respondent's statement be suppressed.

II

The court below assumed, without discussion, that the privilege against self-incrimination required that the gun derived from respondent's statement also be suppressed, whether or not the State could independently link it to him.[2] That conclusion was, in my view, incorrect.

A

Citizens in our society have a deeply rooted social obligation "to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U. S., at 478.

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[2] Respondent contends that the separate admissibility of the gun is not preserved for our review. Brief for Respondent 45–51. This contention is meritless. Respondent's motion to suppress and supporting affidavit asked that the gun be excluded because it was obtained in contravention of his privilege under the Fifth Amendment. See App. 5a, 7a–8a. The State clearly opposed this motion, contending that admission of the statements and the gun would not violate respondent's rights under the Constitution. *Id.*, at 9a. Both the Supreme Court of the State of New York and the New York Court of Appeals required the gun, as well as the statements, to be suppressed because respondent was not given the warnings to which they thought he was constitutionally entitled. *Id.*, at 43a (Supreme Court); 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985 (Court of Appeals). The issue whether the failure to administer warnings by itself constitutionally requires exclusion of the gun was therefore clearly contested, passed on, and preserved for this Court's review. See *Illinois* v. *Gates*, 462 U. S. 213, 217–224 (1983).

Respondent also contends that, under New York law, there is an "independent and adequate state ground" on which the Court of Appeals' judgment can rest. Brief for Respondent 51–55. This may be true, but it is also irrelevant. Both the trial and appellate courts of New York relied on *Miranda* to justify exclusion of the gun; they did not cite or expressly rely on any independent state ground in their decisions. In these circumstances, this Court has jurisdiction. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

Except where a recognized exception applies, "the criminal defendant no less than any other citizen is obliged to assist the authorities." *Roberts* v. *United States*, 445 U. S. 552, 558 (1980). The privilege against compulsory self-incrimination is one recognized exception, but it is an exception nonetheless. Only the introduction of a defendant's own *testimony* is proscribed by the Fifth Amendment's mandate that no person "shall be compelled in any criminal case to be a witness against himself." That mandate does not protect an accused from being compelled to surrender *nontestimonial* evidence against himself. See *Fisher* v. *United States*, 425 U. S. 391, 408 (1976).

The distinction between testimonial and nontestimonial evidence was explored in some detail in *Schmerber* v. *California*, 384 U. S. 757 (1966), a decision this Court handed down a week after deciding *Miranda*. The defendant in *Schmerber* had argued that the privilege against self-incrimination barred the State from compelling him to submit to a blood test, the results of which would be used to prove his guilt at trial. The State, on the other hand, had urged that the privilege prohibited it only from compelling the accused to make a formal testimonial statement against himself in an official legal proceeding. This Court rejected both positions. It favored an approach that protected the "accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." 384 U. S., at 761. The blood tests were admissible because they were neither testimonial nor communicative in nature. *Id.*, at 765.

In subsequent decisions, the Court relied on *Schmerber* in holding the privilege inapplicable to situations where the accused was compelled to stand in a lineup and utter words that allegedly had been spoken by the robber, see *United States* v. *Wade*, 388 U. S. 218, 221–223 (1967), to provide handwriting samples, see *Gilbert* v. *California*, 388 U. S. 263, 265–266 (1967), and to supply voice exemplars. See *United States* v. *Dionisio*, 410 U. S. 1, 5–7 (1973); see also *United States* v.

Mara, 410 U. S. 19, 21–22 (1973). "The distinction which . . . emerged [in these cases], often expressed in different ways, [was] that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber* v. *California*, *supra*, at 764.

B

The gun respondent was compelled to supply is clearly evidence of the "real or physical" sort. What makes the question of its admissibility difficult is the fact that, in asking respondent to produce the gun, the police also "compelled" him, in the *Miranda* sense, to create an incriminating testimonial response. In other words, the case is problematic because police compelled respondent not only to provide the gun but also to admit that he knew where it was and that it was his.

It is settled that *Miranda* did not itself determine whether physical evidence obtained in this manner would be admissible. See *Michigan* v. *Tucker*, 417 U. S., at 445–446, 447, 452, and n. 26. But the Court in *Schmerber*, with *Miranda* fresh on its mind, did address the issue. In concluding that the privilege did not require suppression of compelled blood tests, the Court noted:

> "This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable byproduct of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test—products which would fall within the privilege." 384 U. S., at 765, and n. 9 (emphasis in original).

Thus, *Schmerber* resolved the dilemma by allowing admission of the nontestimonial, but not the testimonial, products of the State's compulsion.

The Court has applied this bifurcated approach in its subsequent cases as well. For example, in *United States* v. *Wade*, 388 U. S. 218, 223 (1967), where admission of a lineup identification was approved, the Court emphasized that no question was presented as to the admissibility of anything said or done at the lineup. Likewise, in *Michigan* v. *Tucker*, where evidence derived from a technical *Miranda* violation was admitted, the Court noted that no statement taken without *Miranda* warnings was being admitted into evidence. See 417 U. S., at 445; cf. *California* v. *Byers*, 402 U. S. 424, 431–433 (1971) (opinion of BURGER, C. J.). Thus, based on the distinction first articulated in *Schmerber*, "a strong analytical argument can be made for an intermediate rule whereby[,] although [the police] cannot require the suspect to speak by punishment or force, the nontestimonial [evidence derived from] speech that is [itself] excludable for failure to comply with the *Miranda* code could still be used." H. Friendly, Benchmarks 280 (1967).

To be sure, admission of nontestimonial evidence secured through informal custodial interrogation will reduce the incentives to enforce the *Miranda* code. But that fact simply begs the question of *how much* enforcement is appropriate. There are some situations, as the Court's struggle to accommodate a "public safety" exception demonstrates, in which the societal cost of administering the *Miranda* warnings is very high indeed.[3] The *Miranda* decision quite practically does not express any societal interest in having those warnings administered for their own sake. Rather, the warnings and waiver are only required to ensure that "testimony" used against the accused at trial is voluntarily given. Therefore, if the testimonial aspects of the accused's custodial communications are suppressed, the failure to administer the *Miranda* warnings should cease to be of concern. Cf. *Weatherford* v. *Bursey*, 429 U. S. 545 (1977) (where interference with assistance of counsel has no effect on trial, no Sixth Amendment violation lies). The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.

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[3] The most obvious example, first suggested by Judge Henry Friendly, involves interrogation directed to the discovery and termination of an ongoing criminal activity such as kidnaping or extortion. See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 949 (1965).

C

There are, of course, decisions of this Court which suggest that the privilege against self-incrimination requires suppression not only of compelled statements but also of all evidence derived therefrom. See, *e. g.*, *Maness* v. *Meyers*, 419 U. S. 449 (1975); *Kastigar* v. *United States*, 406 U. S. 441 (1972); *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). In each of these cases, however, the Court was responding to the dilemma that confronts persons asserting their Fifth Amendment privilege to a court or other tribunal vested with the contempt power. In each instance, the tribunal can require witnesses to appear without any showing of probable cause to believe they have committed an offense or that they have relevant information to convey, and require the witnesses to testify even if they have formally and expressly asserted a privilege of silence. Individuals in this situation are faced with what Justice Goldberg once described as "the cruel trilemma of self-accusation, perjury, or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). If the witness' invocation of the privilege at trial is not to be defeated by the State's refusal to let him remain silent at an earlier proceeding, the witness has to be protected "against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case. . . ." *Lefkowitz* v. *Turley*, 414 U. S. 70, 78 (1973).

By contrast, suspects subject to informal custodial police interrogation of the type involved in this case are not in the same position as witnesses required to appear before a court, grand jury, or other such formal tribunal. Where independent evidence leads police to a suspect, and probable cause justifies his arrest, the suspect cannot seriously urge that the police have somehow unfairly infringed on his right "to a private enclave where he may lead a private life." *Murphy* v. *Waterfront Comm'n*, *supra*, at 55. Moreover, when a suspect interjects not the privilege itself but a *post hoc* complaint that the police failed to administer *Miranda* warnings, he invokes only an irrebuttable presumption that the interrogation was coercive. He does not show that a privilege was raised and that the police actually or overtly coerced him to provide testimony and other evidence to be used against him at trial. See *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966). He could have remained silent and the interrogator could not have punished him for refusing to speak. Indeed, the accused is in the unique position of seeking the protection of the privilege without having timely asserted it. Cf. *United States* v. *Kordel*, 397 U. S. 1, 10 (1970) (failure to assert waives right to complain about testimonial compulsion). The person in police custody surely may sense that he is in "trouble," *Oregon* v. *Hass*, 420 U. S. 714, 722 (1975), but he is in no position to protest that he faced the Hobson's choice of self-accusation, perjury, or contempt. He therefore has a much less sympathetic case for obtaining the benefit of a broad suppression ruling. See *Michigan* v. *Tucker*, 417 U. S., at 444–451; cf. *New Jersey* v. *Portash*, 440 U. S. 450, 458–459 (1979).

Indeed, whatever case can be made for suppression evaporates when the statements themselves are not admitted, given the rationale of the *Schmerber* line of cases. Certainly interrogation which provides leads to other evidence does not offend the values underlying the Fifth Amendment privilege any more than the compulsory taking of blood samples, fingerprints, or voice exemplars, all of which may be compelled in an "attempt to discover evidence that might be used to prosecute [a defendant] for a criminal offense." *Schmerber* v. *California*, 384 U. S., at 761. Use of a suspect's answers "merely to find other evidence establishing his connection with the crime [simply] differs only by a shade from the permitted use for that purpose of his body or his blood." H. Friendly, Benchmarks 280 (1967). The values underlying the privilege may justify exclusion of an unwarned person's out-of-court statements, as perhaps they may justify exclusion of statements and derivative evidence compelled under the threat of contempt. But when the only evidence to be admitted is derivative evidence such as a gun—derived not from actual compulsion but from a statement taken in the absence of *Miranda* warnings—those values simply cannot require suppression, at least no more so than they would for other such nontestimonial evidence.[4]

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[4] In suggesting that *Wong Sun* v. *United States*, 371 U. S. 471 (1963), requires exclusion of the gun, see *post*, at 688–689, JUSTICE MARSHALL fails to acknowledge this Court's holding in *Michigan* v. *Tucker*, 417 U. S. 433, 445–446 (1974). In *Tucker*, the Court very clearly held that *Wong Sun* is inapplicable in cases involving mere departures from *Miranda*. *Wong Sun* and its "fruit of the poisonous tree" analysis lead to exclusion of derivative evidence only where the underlying police misconduct infringes a "core" constitutional right. See 417 U. S., at 445–446. Failure to administer *Miranda* warnings violates only a nonconstitutional prophylactic. *Ibid.*

Nix v. *Williams*, *ante*, p. 431, is not to the contrary. In *Nix*, the Court held that evidence which inevitably would have been discovered need not be excluded at trial because of independent police misconduct. The Court in *Nix* discusses *Wong Sun* and its "fruit of the poisonous tree" analysis only to show that, even assuming a "core" violation of the Fourth, Fifth, or Sixth Amendment, evidence with a separate causal link need not be excluded at trial. Thus, *Nix* concludes that only "where 'the subse-

On the other hand, if a suspect is subject to abusive police practices and actually or overtly compelled to speak, it is reasonable to infer both an unwillingness to speak and a perceptible assertion of the privilege. See *Mincey* v. *Arizona*, 437 U. S. 385, 396–402 (1978). Thus, when the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of a broader exclusionary rule is warranted. Of course, "a defendant raising [such] a coerced-confession claim . . . must first prevail in a voluntariness hearing before his confession and evidence derived from it [will] become inadmissible." *Kastigar* v. *United States*, 406 U. S., at 462. By contrast, where the accused proves only that the police failed to administer the *Miranda* warnings, exclusion of the statement itself is all that will and should be required.[5] Limitation of the *Miranda* prohibition to testimonial use of the statements themselves adequately serves the purposes of the privilege against self-incrimination.

III

In *Miranda*, the Court looked to the experience of countries like England, India, Scotland, and Ceylon in developing its code to regulate custodial interrogations. See *Miranda*

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quent trial [cannot] cure a[n otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant,'" *ante*, at 447 (quoting from *United States* v. *Ash*, 413 U. S. 300, 315 (1973)), should derivative evidence be excluded. Cf. *Brewer* v. *Williams*, 430 U. S. 387, 406–407, and n. 12 (1977) (leaving open question whether any evidence beyond the incriminating statements themselves must be excluded); *Massiah* v. *United States*, 377 U. S. 201, 207 (1964) (same).

[5] Respondent has not previously contended that his confession was so blatantly coerced as to constitute a violation of due process. He has argued only that police failed to administer *Miranda* warnings. He has proved, therefore, only that his statement was *presumptively* compelled. In any event, that is a question for the trial court on remand to decide in the first instance, not for this Court to decide on certiorari review.

v. *Arizona,* 384 U. S., at 486–489. Those countries had also adopted procedural rules to regulate the manner in which police secured confessions to be used against accused persons at trial. See Note, Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1090–1114 (1966). Confessions induced by trickery or physical abuse were never admissible at trial, and any confession secured without the required procedural safeguards could, in the courts' discretion, be excluded on grounds of fairness or prejudice. See Gotlieb, Confirmation by Subsequent Facts, 72 L. Q. Rev. 209, 223–224 (1956). But nontestimonial evidence derived from all confessions "not blatantly coerced" was and still is admitted. Friendly, *supra,* at 282; see also *Commissioners of Customs and Excise* v. *Harz,* 1 All E. R. 177, 182 (1967); *King* v. *Warickshall,* 1 Leach 262, 168 Eng. Rep. 234 (K. B. 1783). Admission of nontestimonial evidence of this type is based on the very sensible view that procedural errors should not cause entire investigations and prosecutions to be lost. See Enker & Elsen, Counsel For the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois,* 49 Minn. L. Rev. 47, 80 (1964).

The learning of these countries was important to development of the initial *Miranda* rule. It therefore should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today.[6] I would apply that learning in this case and adhere to our precedents requiring that statements elicited in the absence of *Miranda* warnings be suppressed. But because nontestimonial evidence such as the gun should not be suppressed, I join in that part of the Court's judgment that reverses and remands for further proceedings with the gun admissible as evidence against the accused.

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[6] Interestingly, the trend in these other countries is to admit the improperly obtained statements themselves, if nontestimonial evidence later corroborates, in whole or in part, the admission. See Note, Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1094–1095, 1100, 1104, 1108–1109 (1966); see also *Queen* v. *Ramasamy,* [1965] A. C. 1, 12–15 (P. C.).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The police in this case arrested a man suspected of possessing a firearm in violation of New York law. Once the suspect was in custody and found to be unarmed, the arresting officer initiated an interrogation. Without being advised of his right not to respond, the suspect incriminated himself by locating the gun. The majority concludes that the State may rely on this incriminating statement to convict the suspect of possessing a weapon. I disagree. The arresting officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. By finding on these facts justification for unconsented interrogation, the majority abandons the clear guidelines enunciated in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and condemns the American judiciary to a new era of *post hoc* inquiry into the propriety of custodial interrogations. More significantly and in direct conflict with this Court's longstanding interpretation of the Fifth Amendment, the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions. I dissent.

I

Shortly after midnight on September 11, 1980, Officer Kraft and three other policemen entered an A & P supermarket in search of respondent Quarles, a rape suspect who was reportedly armed. After a brief chase, the officers cornered Quarles in the back of the store. As the other officers trained their guns on the suspect, Officer Kraft frisked Quarles and discovered an empty shoulder holster. Officer Kraft then handcuffed Quarles, and the other officers holstered their guns. With Quarles' hands manacled behind his back and the other officers standing close by, Officer Kraft questioned Quarles: "Where is the gun?" Gesturing towards a stack of liquid-soap cartons a few feet away, Quarles responded: "The gun is over there." Behind the cartons, the police found a loaded revolver. The State of New York subsequently failed to prosecute the alleged rape, and charged Quarles on a solitary count of criminal possession of a weapon in the third degree.[1] As proof of the critical element of the offense, the State sought to introduce Quarles' response to Officer Kraft's question as well as the revolver found behind the cartons. The Criminal Term of the Supreme Court of the State of New York ordered both Quarles' statement and the gun suppressed. The suppression order was affirmed first by the Appellate Division, 85 App. Div. 2d 936, 447 N. Y. S. 2d 84 (1981), and again by the New York Court of Appeals, 58 N. Y. 2d 664, 444 N. E. 2d 984 (1982) (mem.).

The majority's entire analysis rests on the factual assumption that the public was at risk during Quarles' interrogation. This assumption is completely in conflict with the facts as found by New York's highest court. Before the interrogation began, Quarles had been "reduced to a condition of physical powerlessness." *Id.*, at 667, 444 N. E. 2d, at 986. Contrary to the majority's speculations, *ante*, at 657, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns. As Officer Kraft acknowledged at the suppression hearing, "the situation was under control." App. 35a. Based on Officer Kraft's own testimony, the New York Court of Appeals found: "Nothing suggests that any of the officers was by that time concerned for his own physical safety." 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985. The Court of Appeals also determined that there was no evidence that the interrogation was prompted by the arresting officers' concern for the public's safety. *Ibid.*

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[1] Under New York law, any person who possesses a loaded firearm outside of his home or place of business is guilty of criminal possession of a weapon in the third degree. N. Y. Penal Law § 265.02(4) (McKinney 1980).

The majority attempts to slip away from these unambiguous findings of New York's highest court by proposing that danger be measured by objective facts rather than the subjective intentions of arresting officers. *Ante,* at 655–656. Though clever, this ploy was anticipated by the New York Court of Appeals: "[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety . . . ." 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985.

The New York court's conclusion that neither Quarles nor his missing gun posed a threat to the public's safety is amply supported by the evidence presented at the suppression hearing. Again contrary to the majority's intimations, *ante,* at 657, no customers or employees were wandering about the store in danger of coming across Quarles' discarded weapon. Although the supermarket was open to the public, Quarles' arrest took place during the middle of the night when the store was apparently deserted except for the clerks at the check-out counter. The police could easily have cordoned off the store and searched for the missing gun. Had they done so, they would have found the gun forthwith. The police were well aware that Quarles had discarded his weapon somewhere near the scene of the arrest. As the State acknowledged before the New York Court of Appeals: "After Officer Kraft had handcuffed and frisked the defendant in the supermarket, *he knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter.* He undoubtedly would have searched for it in the carton a few feet away without the defendant having looked in that direction and saying that it was there." Brief for Appellant in No. 2512/80 (N. Y. Ct. App.), p. 11 (emphasis added).

Earlier this Term, four Members of the majority joined an opinion stating: "[Q]uestions of historical fact . . . must be determined, in the first instance, by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts." *Rushen* v. *Spain*, 464 U. S. 114, 120 (1983) *(per curiam)*. In this case, there was convincing, indeed almost overwhelming, evidence to support the New York court's conclusion that Quarles' hidden weapon did not pose a risk either to the arresting officers or to the public. The majority ignores this evidence and sets aside the factual findings of the New York Court of Appeals. More cynical observers might well conclude that a state court's findings of fact "deserv[e] a 'high measure of deference,'" *ibid.* (quoting *Sumner* v. *Mata*, 455 U. S. 591, 598 (1982)), only when deference works against the interests of a criminal defendant.

II

The majority's treatment of the legal issues presented in this case is no less troubling than its abuse of the facts. Before today's opinion, the Court had twice concluded that, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), police officers conducting custodial interrogations must advise suspects of their rights before any questions concerning the whereabouts of incriminating weapons can be asked. *Rhode Island* v. *Innis*, 446 U. S. 291, 298–302 (1980) (dicta); *Orozco* v. *Texas*, 394 U. S. 324 (1969) (holding).[2] Now the majority departs from these cases and rules that police may withhold

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[2] The majority attempts to distinguish *Orozco* by stressing the fact that the interrogation in this case immediately followed Quarles' arrest whereas the interrogation in *Orozco* occurred some four hours after the crime and was investigatory. *Ante*, at 655, n. 5. I fail to comprehend the distinction. In both cases, a group of police officers had taken a suspect into custody and questioned the suspect about the location of a missing gun. In both cases a dangerous weapon was missing, and in neither case was there any direct evidence where the weapon was hidden.

Miranda warnings whenever custodial interrogations concern matters of public safety.[3]

The majority contends that the law, as it currently stands, places police officers in a dilemma whenever they interrogate a suspect who appears to know of some threat to the public's safety. *Ante*, at 657. If the police interrogate the suspect without advising him of his rights, the suspect may reveal information that the authorities can use to defuse the threat, but the suspect's statements will be inadmissible at trial. If, on the other hand, the police advise the suspect of his rights, the suspect may be deterred from responding to the police's questions, and the risk to the public may continue unabated. According to the majority, the police must now choose between establishing the suspect's guilt and safeguarding the public from danger.

The majority proposes to eliminate this dilemma by creating an exception to *Miranda* v. *Arizona* for custodial interrogations concerning matters of public safety. *Ante*, at 658–659. Under the majority's exception, police would be permitted to interrogate suspects about such matters before the suspects have been advised of their constitutional rights. Without being "deterred" by the knowledge that they have a constitutional right not to respond, these suspects will be likely to answer the questions. Should the answers also be incriminating, the State would be free to introduce them as evidence in a criminal prosecution. Through this "narrow exception to the *Miranda* rule," *ante*, at 658, the majority proposes to protect the public's safety without jeopardizing the prosecution of criminal defendants. I find in this reasoning an unwise and unprincipled departure from our Fifth Amendment precedents.

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[3] Although the majority stresses the exigencies of Quarles' arrest, it is undisputed that Quarles was in custody when Officer Kraft's questioning began, *ante*, at 655, and there is nothing in the majority's rationale—save the instincts of police officers—to prevent it from applying to all custodial interrogations.

Before today's opinion, the procedures established in *Miranda* v. *Arizona* had "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979); see *Harryman* v. *Estelle*, 616 F. 2d 870, 873–874 (CA5 1980) (en banc), cert. denied, 449 U. S. 860 (1980). In a chimerical quest for public safety, the majority has abandoned the rule that brought 18 years of doctrinal tranquility to the field of custodial interrogations. As the majority candidly concedes, *ante*, at 658, a public-safety exception destroys forever the clarity of *Miranda* for both law enforcement officers and members of the judiciary. The Court's candor cannot mask what a serious loss the administration of justice has incurred.

This case is illustrative of the chaos the "public-safety" exception will unleash. The circumstances of Quarles' arrest have never been in dispute. After the benefit of briefing and oral argument, the New York Court of Appeals, as previously noted, concluded that there was "no evidence in the record before us that there were exigent circumstances posing a risk to the public safety." 58 N. Y. 2d, at 666, 444 N. E. 2d, at 985. Upon reviewing the same facts and hearing the same arguments, a majority of this Court has come to precisely the opposite conclusion: "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety. . . ." *Ante*, at 657.

If after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world. As THE CHIEF JUSTICE wrote in a similar context: "Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated . . . ." *Rhode Island* v. *Innis*, 446 U. S., at 304 (concurring in judgment). Not only will police officers have to decide whether the objective facts of an arrest justify an unconsented custodial interrogation, they will also have to remember to interrupt the interrogation and read the suspect his *Miranda* warnings once the focus of the inquiry shifts from protecting the public's safety to ascertaining the suspect's guilt. Disagreements of the scope of the "public-safety" exception and mistakes in its application are inevitable.[4]

The end result, as JUSTICE O'CONNOR predicts, will be "a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence." *Ante*, at 663–664. In the meantime, the courts will have to dedicate themselves to spinning this new web of doctrines, and the country's law enforcement agencies will have to suffer patiently through the frustations of another period of constitutional uncertainty.

III

Though unfortunate, the difficulty of administering the "public-safety" exception is not the most profound flaw in the majority's decision. The majority has lost sight of the fact that *Miranda* v. *Arizona* and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.

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[4] One of the peculiarities of the majority's decision is its suggestion that police officers can "distinguish almost instinctively" questions tied to public safety and questions designed to elicit testimonial evidence. *Ante*, at 658. Obviously, these distinctions are extraordinary difficult to draw. In many cases—like this one—custodial questioning may serve both purposes. It is therefore wishful thinking for the majority to suggest that the intuitions of police officers will render its decision self-executing.

A

The majority's error stems from a serious misunderstanding of *Miranda* v. *Arizona* and of the Fifth Amendment upon which that decision was based. The majority implies that *Miranda* consisted of no more than a judicial balancing act in which the benefits of "enlarged protection for the Fifth Amendment privilege" were weighed against "the cost to society in terms of fewer convictions of guilty suspects." *Ante*, at 656–657. Supposedly because the scales tipped in favor of the privilege against self-incrimination, the *Miranda* Court erected a prophylactic barrier around statements made during custodial interrogations. The majority now proposes to return to the scales of social utility to calculate whether *Miranda*'s prophylactic rule remains cost-effective when threats to the public's safety are added to the balance. The results of the majority's "test" are announced with pseudoscientific precision:

> "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Ante*, at 657.

The majority misreads *Miranda*. Though the *Miranda* dissent prophesized dire consequences, see 384 U. S., at 504, 516–517 (Harlan, J., dissenting), the *Miranda* Court refused to allow such concerns to weaken the protections of the Constitution:

> "A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government

> when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." *Id.*, at 479 (citation omitted).

Whether society would be better off if the police warned suspects of their rights before beginning an interrogation or whether the advantages of giving such warnings would outweigh their costs did not inform the *Miranda* decision. On the contrary, the *Miranda* Court was concerned with the proscriptions of the Fifth Amendment, and, in particular, whether the Self-Incrimination Clause permits the government to prosecute individuals based on statements made in the course of custodial interrogations.

Miranda v. *Arizona* was the culmination of a century-long inquiry into how this Court should deal with confessions made during custodial interrogations. Long before *Miranda*, the Court had recognized that the Federal Government was prohibited from introducing at criminal trials compelled confessions, including confessions compelled in the course of custodial interrogations. In 1924, Justice Brandeis was reciting settled law when he wrote: "[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." *Wan* v. *United States*, 266 U. S. 1, 14–15 (citing *Bram* v. *United States*, 168 U. S. 532 (1897)).

Prosecutors in state courts were subject to similar constitutional restrictions. Even before *Malloy* v. *Hogan*, 378 U. S. 1 (1964), formally applied the Self-Incrimination Clause of the Fifth Amendment to the States, the Due Process Clause constrained the States from extorting confessions from criminal defendants. *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1936). Indeed, by the time of *Malloy*, the constraints of the Due Process Clause were almost as stringent as the requirements of the Fifth Amendment itself. 378 U. S., at 6–7; see, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963).

When *Miranda* reached this Court, it was undisputed that both the States and the Federal Government were constitutionally prohibited from prosecuting defendants with confessions coerced during custodial interrogations.[5] As a theoretical matter, the law was clear. In practice, however, the courts found it exceedingly difficult to determine whether a given confession had been coerced. Difficulties of proof and subtleties of interrogation technique made it impossible in most cases for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled. Courts around the country were spending countless hours reviewing the facts of individual custodial interrogations. See Note, Developments in the Law—Confessions, 79 Harv. L. Rev. 935 (1966).

Miranda dealt with these practical problems. After a detailed examination of police practices and a review of its previous decisions in the area, the Court in *Miranda* determined that custodial interrogations are inherently coercive. The Court therefore created a constitutional presumption that statements made during custodial interrogations are compelled in violation of the Fifth Amendment and are thus inadmissible in criminal prosecutions. As a result of the Court's decision in *Miranda*, a statement made during a custodial interrogation may be introduced as proof of a defendant's guilt only if the prosecution demonstrates that the defendant knowingly and intelligently waived his constitutional rights before making the statement.[6] The now-familiar *Miranda* warnings offer law enforcement authorities a clear, easily administered device for ensuring that criminal suspects understand their constitutional rights well enough to waive them and to engage in consensual custodial interrogation.

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[5] There was, of course, still considerable confusion over whether the Sixth Amendment or the Fifth Amendment provided the basis for this prohibition. See *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). But the matter was undeniably of constitutional magnitude.

[6] Until today, the Court has consistently adhered to *Miranda*'s holding that, absent informed waiver, statements made during a custodial interrogation cannot be used to prove a defendant's guilt. Admittedly, in *Harris* v. *New York*, 401 U. S. 222 (1971), the Court permitted such statements to be introduced to impeach a defendant, but their introduction was tolerated only because the jury had been instructed to consider the statements "only

In fashioning its "public-safety" exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. The majority does not argue that police questioning about issues of public safety is any less coercive than custodial interrogations into other matters. The majority's only contention is that police officers could more easily protect the public if *Miranda* did not apply to custodial interrogations concerning the public's safety.[7] But *Miranda* was not a decision about public safety; it was a decision about coerced confessions. Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety" exception and remain faithful to the logic of *Miranda* v. *Arizona*.

B

The majority's avoidance of the issue of coercion may not have been inadvertent. It would strain credulity to contend

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in passing on [the defendant's] credibility and not as evidence of guilt." *Id.*, at 223.

[7] The majority elsewhere attempts to disguise its decision as an effort to cut back on the overbreadth of *Miranda*'s prophylactic standard. *Ante*, at 654–655. The disguise is transparent. Although *Miranda* was overbroad in that its application excludes some statements made during custodial interrogations that are not in fact coercive, the majority is not dealing with a class of cases affected by *Miranda*'s overbreadth. The majority is exempting from *Miranda*'s prophylactic rule incriminating statements that were elicited to safeguard the public's safety. As is discussed below, see *infra*, at 685–686, the majority supports the "public-safety" exception because "public-safety" interrogations can be coercive. In this respect, the Court's decision differs greatly from *Michigan* v. *Tucker*, 417 U. S. 433 (1974), in which the Court sanctioned the admission of the fruits of a *Miranda* violation, but only because the violation was technical and the interrogation itself noncoercive.

that Officer Kraft's questioning of respondent Quarles was not coercive.[8] In the middle of the night and in the back of an empty supermarket, Quarles was surrounded by four armed police officers. His hands were handcuffed behind his back. The first words out of the mouth of the arresting officer were: "Where is the gun?" In the majority's phrase, the situation was "kaleidoscopic." *Ante*, at 656. Police and suspect were acting on instinct. Officer Kraft's abrupt and pointed question pressured Quarles in precisely the way that the *Miranda* Court feared the custodial interrogations would coerce self-incriminating testimony.

That the application of the "public-safety" exception in this case entailed coercion is no happenstance. The majority's *ratio decidendi* is that interrogating suspects about matters of public safety *will* be coercive. In its cost-benefit analysis, the Court's strongest argument in favor of a "public-safety" exception to *Miranda* is that the police would be better able to protect the public's safety if they were not always required to give suspects their *Miranda* warnings. The crux of this argument is that, by deliberately withholding *Miranda* warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights. The "public-safety" exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements.

Indeed, in the efficacy of the "public-safety" exception lies a fundamental and constitutional defect. Until today, this Court could truthfully state that the Fifth Amendment is given "broad scope" "[w]here there has been genuine compulsion of testimony." *Michigan* v. *Tucker*, 417 U. S. 433, 440 (1974). Coerced confessions were simply inadmissible in criminal prosecutions. The "public-safety" exception departs from this principle by expressly inviting police officers to coerce defendants into making incriminating statements, and then permitting prosecutors to introduce those statements at trial. Though the majority's opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned *sub silentio* criminal prosecutions based on compelled self-incriminating statements. I find this result in direct conflict with the Fifth Amendment's dictate that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

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[8] The majority's reliance on respondent's failure to claim that his testimony was compelled by police conduct can only be disingenous. Before today's opinion, respondent had no need to claim actual compulsion. Heretofore, it was sufficient to demonstrate that the police had conducted nonconsensual custodial interrogation. But now that the law has changed, it is only fair to examine the facts of the case to determine whether coercion probably was involved.

The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* v. *Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial. Cf. *Weatherford* v. *Bursey*, 429 U. S. 545 (1977) (Sixth Amendment violated only if trial affected).

To a limited degree, the majority is correct that there is a cost associated with the Fifth Amendment's ban on introducing coerced self-incriminating statements at trial. Without a "public-safety" exception, there would be occasions when a defendant incriminated himself by revealing a threat to the public, and the State was unable to prosecute because the defendant retracted his statement after consulting with counsel and the police cannot find independent proof of guilt. Such occasions would not, however, be common. The prosecution does not always lose the use of incriminating information revealed in these situations. After consulting with counsel, a suspect may well volunteer to repeat his statement in hopes of gaining a favorable plea bargain or more lenient sentence. The majority thus overstates its case when it suggests that a police officer must necessarily choose between public safety and admissibility.[9]

But however frequently or infrequently such cases arise, their regularity is irrelevant. The Fifth Amendment prohibits compelled self-incrimination.[10] As the Court has explained on numerous occasions, this prohibition is the mainstay of our adversarial system of criminal justice. Not only does it protect us against the inherent unreliability of compelled testimony, but it also ensures that criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness. See *Murphy*

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[9] I also seriously question how often a statement linking a suspect to the threat to the public ends up being the crucial and otherwise unprovable element of a criminal prosecution. The facts of the current case illustrate this point. The police arrested respondent Quarles not because he was suspected of carrying a gun, but because he was alleged to have committed rape. *Ante*, at 651–652. Had the State elected to prosecute on the rape count alone, respondent's incriminating statement about the gun would have had no role in the prosecution. Only because the State dropped the rape count and chose to proceed to trial solely on the criminal-possession charge did respondent's answer to Officer Kraft's question become critical.

[10] In this sense, the Fifth Amendment differs fundamentally from the Fourth Amendment, which only prohibits unreasonable searches and seizures. See *Fisher* v. *United States*, 425 U. S. 391, 400 (1976). Accordingly, the various exceptions to the Fourth Amendment permitting warrantless searches under various circumstances should have no analogy in the Fifth Amendment context. Curiously, the majority accepts this point, see, *ante*, at 652, n. 2, but persists in limiting the protections of the Fifth Amendment.

v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). The policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety. The majority should not be permitted to elude the Amendment's absolute prohibition simply by calculating special costs that arise when the public's safety is at issue. Indeed, were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties.

IV

Having determined that the Fifth Amendment renders inadmissible Quarles' response to Officer Kraft's questioning, I have no doubt that our precedents require that the gun discovered as a direct result of Quarles' statement must be presumed inadmissible as well. The gun was the direct product of a coercive custodial interrogation. In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920), and *Wong Sun* v. *United States*, 371 U. S. 471 (1963), this Court held that the Government may not introduce incriminating evidence derived from an illegally obtained source. This Court recently explained the extent of the *Wong Sun* rule:

> "Although *Silverthorne* and *Wong Sun* involved violations of the Fourth Amendment, the 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, see *United States* v. *Wade*, 388 U. S. 218 (1967), as well as of the Fifth Amendment." *Nix* v. *Williams*, *ante*, at 442 (footnote omitted).

Accord, *United States* v. *Crews*, 445 U. S. 463, 470 (1980).[11] When they ruled on the issue, the New York courts were entirely correct in deciding that Quarles' gun was the tainted fruit of a nonconsensual interrogation and therefore was inadmissible under our precedents.

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[11] As our decisions in *Nix* and *Crews* reveal, the treatment of derivative evidence proposed in JUSTICE O'CONNOR's opinion concurring in the judg-

However, since the New York Court of Appeals issued its opinion, the scope of the *Wong Sun* doctrine has changed. In *Nix* v. *Williams*, *supra*, this Court construed *Wong Sun* to permit the introduction into evidence of constitutionally tainted "fruits" that inevitably would have been discovered by the government. In its briefs before this Court and before the New York courts, petitioner has argued that the "inevitable-discovery" rule, if applied to this case, would permit the admission of Quarles' gun. Although I have not joined the Court's opinion in *Nix*, and although I am not wholly persuaded that New York law would permit the application of the "inevitable-discovery" rule to this case,[12]

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ment in part and dissenting in part, *ante*, p. 660, represents a much more radical departure from precedent than that opinion acknowledges. Although I have serious doubts about the wisdom of her proposal, I will not discuss them here. Petitioner never raised this novel theory of federal constitutional law before any New York court, see Brief for Appellant in No. 2512/80 (N. Y. Ct. App.); Brief for Appellant in No. 2512–80 (N. Y. App. Div.), and no New York court considered the theory *sua sponte*. The matter was therefore "not pressed or passed on in the courts below." *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940). Since petitioner's derivative-evidence theory is of considerable constitutional importance, it would be inconsistent with our precedents to permit petitioner to raise it for the first time now. See *Illinois* v. *Gates*, 462 U. S. 213, 217–223 (1983). An independent reason for declining to rule on petitioner's derivative-evidence theory is that petitioner may have been barred by New York procedures from raising this theory before the New York Court of Appeals. See n. 12, *infra*. Even if the claim were properly presented, it would be injudicious for the Court to embark on a new theory of derivative evidence when the gun in question might be admissible under the construction of *Wong Sun* just enunciated by the Court in *Nix* v. *Williams*. See, *infra* this page and 690.

[12] At least two procedural hurdles could prevent petitioner from making use of the "inevitable-discovery" exception on remand. First, petitioner did not claim inevitable discovery at the suppression hearing. This case therefore contains no record on the issue, and it is unclear whether the question is preserved under New York's procedural law. *People* v. *Mar-*

I believe that the proper disposition of the matter is to vacate the order of the New York Court of Appeals to the extent that it suppressed Quarles' gun and remand the matter to the New York Court of Appeals for further consideration in light of *Nix* v. *Williams*.

Accordingly, I would affirm the order of the Court of Appeals to the extent that it found Quarles' incriminating statement inadmissible under the Fifth Amendment, would vacate the order to the extent that it suppressed Quarles' gun, and would remand the matter for reconsideration in light of *Nix* v. *Williams*.

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tin, 50 N. Y. 2d 1029, 409 N. E. 2d 1363 (1980); *People* v. *Tutt*, 38 N. Y. 2d 1011, 348 N. E. 2d 920 (1976). Second, the New York Rules of Criminal Procedure have codified the "fruit-of-the-poisonous-tree" doctrine. N. Y. Crim. Proc. Law § 710.20(4) (McKinney 1980 and Supp. 1983–1984). Even after *Nix* v. *Williams*, Quarles' gun may still be suppressed under state law. These issues, of course, are matters of New York law, which could be disposed of by the New York courts on remand.

CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82–1795. Argued February 21, 1984—Decided June 18, 1984

Although Oklahoma does not prohibit the sale and consumption of alcoholic beverages within the State, it prohibits, in general, the advertising of such beverages. In 1980, the Oklahoma Attorney General determined that the State's advertising ban prohibited cable television systems operating in Oklahoma from retransmitting out-of-state signals containing alcoholic beverage commercials, particularly wine commercials. Petitioners, operators of cable television systems in Oklahoma—who, with other such operators, had been warned by respondent Director of the Oklahoma Alcoholic Beverage Control Board that they would be criminally prosecuted if they carried out-of-state wine advertisements—filed suit in Federal District Court for declaratory and injunctive relief, alleging that Oklahoma's policy violated various provisions of the Federal Constitution, including the Supremacy Clause and the First Amendment. Granting summary judgment for petitioners, the court held, *inter alia*, that the State's advertising ban was an unconstitutional restriction on petitioners' right to engage in protected commercial speech. The Court of Appeals reversed.

Held:

1. Even though the Court of Appeals did not address it, this Court will address the question whether the Oklahoma ban as applied here so conflicts with federal regulation of cable television systems that it is pre-empted, since the conflict between Oklahoma and federal law was plainly raised in petitioners' complaint, it was acknowledged by both the District Court and the Court of Appeals, the District Court made findings on all factual issues necessary to resolve the question, and the parties briefed and argued the question pursuant to this Court's order. Pp. 697–698.

2. Application of Oklahoma's alcoholic beverages advertising ban to out-of-state signals carried by cable operators in Oklahoma is pre-empted by federal law. Federal regulations have no less pre-emptive effect than federal statutes, and here the power delegated to the Federal Communications Commission (FCC) under the Communications Act of

1934 plainly includes authority to regulate cable television systems in order to ensure achievement of the FCC's statutory responsibilities. Pp. 698–711.

(a) The FCC has for the past 20 years unambiguously expressed its intent to pre-empt state or local regulation of any type of signal carried by cable television systems. Although Oklahoma may, under current FCC rules, regulate such local aspects of cable systems as franchisee selection and construction oversight, nevertheless, by requiring cable television operators to delete commercial advertising contained in signals carried pursuant to federal authority, the State has clearly exceeded its limited jurisdiction and has interfered with a regulatory area that the FCC has explicitly pre-empted. Pp. 700–705.

(b) Oklahoma's advertising ban also conflicts with specific FCC regulations requiring that certain cable television operators, such as petitioners, carry signals from broadcast stations located nearby in other States, and that such signals be carried in full, including any commercial advertisements. Similarly, Oklahoma's ban conflicts with FCC rulings permitting and encouraging cable television systems to import more distant out-of-state broadcast signals, which under FCC regulations must also be carried in full. Enforcement of Oklahoma's ban also would affect nonbroadcast cable services, a source of cable programming over which the FCC has explicitly asserted exclusive jurisdiction. Moreover, it would be a prohibitively burdensome task for a cable operator to monitor each signal it receives and delete every wine commercial, and thus enforcement of Oklahoma's ban might deprive the public of the wide variety of programming options that cable systems make possible. Such a result is wholly at odds with the FCC's regulatory goal of making available the benefits of cable communications on a nationwide basis. Pp. 705–709.

(c) Congress—through the Copyright Revision Act of 1976—has also acted to facilitate the cable industry's ability to distribute broadcast programming on a national basis. The Act establishes a program of compulsory copyright licensing that permits a cable operator to retransmit distant broadcast signals upon payment of royalty fees to a central fund, but requires that the operator refrain from deleting commercial advertising from the signals. Oklahoma's deletion requirement forces cable operators to lose the protections of compulsory licensing, or to abandon their importation of broadcast signals covered by the Act. Such a loss of viewing options would thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals. Pp. 709–711.

3. The Twenty-first Amendment does not save Oklahoma's advertising ban from pre-emption. The States enjoy broad power under § 2

of that Amendment to regulate the importation and use of intoxicating liquor within their borders, but when a State does not attempt directly to regulate the sale or use of liquor, a conflicting exercise of federal authority may prevail. In such a case, the central question is whether the interests implicated by a state regulation are so closely related to the powers reserved by the Amendment that the regulation may prevail, even though its requirements directly conflict with express federal policies. Resolution of this question requires a pragmatic effort to harmonize state and federal powers within the context of the issues and interests at stake. Here, Oklahoma's interest in discouraging consumption of intoxicating liquor is limited, since the State's ban is directed only at occasional wine commercials appearing on out-of-state signals carried by cable operators, while the State permits advertisements for all alcoholic beverages carried in newspapers and other publications printed outside Oklahoma but sold in the State. The State's interest is not of the same stature as the FCC's interest in ensuring widespread availability of diverse cable services throughout the United States. Pp. 711–716.

699 F. 2d 490, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Brent N. Rushforth argued the cause for petitioners. With him on the briefs for petitioners Cox Cable of Oklahoma City, Inc., et al., were *John D. Matthews*, *David P. Fleming*, and *J. Christopher Redding*. *Timothy B. Dyk* and *Clyde A. Muchmore* filed briefs for petitioner Capital Cities Cable, Inc.

Michael W. McConnell argued the cause *pro hac vice* for the Federal Communications Commission as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Bator*, *Richard G. Wilkins*, *Bruce E. Fein*, and *C. Grey Pash, Jr.*

Robert L. McDonald, First Assistant Attorney General of Oklahoma, argued the cause for respondent. With him on the brief were *Michael C. Turpen*, Attorney General, and *James B. Franks* and *Lynn Barnett*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *John G. Koeltl*, *James C. Goodale*, *Burt Neu-*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether Oklahoma may require cable television operators in that State to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they retransmit by cable to their subscribers. Petitioners contend that Oklahoma's requirement abridges their rights under the First and Fourteenth Amendments and is pre-empted by federal law. Because we conclude that this state regulation is pre-empted, we reverse the judgment of the Court of Appeals for the Tenth Circuit and do not reach the First Amendment question.

I

Since 1959, it has been lawful to sell and consume alcoholic beverages in Oklahoma. The State Constitution, however, as well as implementing statutes, prohibits the advertising of such beverages, except by means of strictly regulated on-premises signs.[1] For several years, pursuant to this author-

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borne, and *Charles S. Sims;* for the National Association of Broadcasters et al. by *Floyd Abrams*, *Dean Ringel*, and *Susan Buckley;* for the National Cable Television Association, Inc., et al., by *Brenda L. Fox*, *Robert St. John Roper*, *Michael S. Schooler*, *Henry J. Gerken*, *Ian D. Volner*, and *Mark L. Pelesh;* and for the Turner Broadcasting System, Inc., et al., by *Bruce D. Sokler* and *Peter A. Casciato*.

Larry Derryberry filed a brief for S. A. N. E., Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Mississippi by *Bill Allain*, Attorney General, and *Peter M. Stockett, Jr.*, Special Assistant Attorney General; for the American Advertising Federation et al. by *Eric M. Rubin* and *Walter E. Diercks;* for the American Newspaper Publishers Association et al. by *Marshall J. Nelson*, *W. Terry Maguire*, and *Pamela J. Riley;* and for the National League of Cities by *Ross D. Davis*, *David R. Ohlbaum*, and *Henry Geller*.

[1] The Oklahoma Constitution provides in pertinent part:

"It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at ity, Oklahoma has prohibited television broadcasting stations in the State from broadcasting alcoholic beverage commercials as part of their locally produced programming and has required these stations to block out all such advertising carried on national network programming. See *Oklahoma Alcoholic Beverage Control Board* v. *Heublein Wines, Int'l*, 566 P. 2d 1158, 1160 (Okla. 1977).[2] At the same time, the Oklahoma Attorney General has ruled—principally because of the practical difficulties of enforcement—that the ban does not apply to alcoholic beverage advertisements appearing in newspapers, magazines, and other publications printed outside Oklahoma but sold and distributed in the State. Consequently, out-of-state publications may be delivered to Oklahoma subscribers and sold at retail outlets within the State, even though they contain advertisements for alcoholic beverages. Until 1980, Oklahoma applied a similar policy to cable television operators who were permitted to retransmit out-of-state signals containing alcoholic beverage commercials to their subscribers. In March of that year, however, the Oklahoma Attorney General issued an opinion in which he concluded that the retransmission of out-of-state alcoholic beverage commercials by cable television systems operating in the State would be considered a violation of the advertising ban. 11 Op. Okla. Atty. Gen. No. 79–334, p. 550 (Mar. 19,

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the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Art. XXVII, § 5.

The Oklahoma Alcoholic Beverage Control Act similarly prohibits advertising "any alcoholic beverages or the sale of same" except by on-premises signs which must conform to specified size limitations. Okla. Stat., Tit. 37, § 516 (1981).

[2] In upholding this requirement, the Oklahoma Supreme Court specifically noted that it was technically feasible for local television stations to delete alcoholic beverage commercials from the national network programming that they broadcast, because the networks provide sufficient advance notice of such commercials to their Oklahoma affiliates and thereby enable those affiliates to block out those commercials. 566 P. 2d, at 1162.

1980). Respondent Crisp, Director of the Oklahoma Alcoholic Beverage Control Board, thereafter warned Oklahoma cable operators, including petitioners, that they would be criminally prosecuted if they continued to carry such out-of-state advertisements over their systems. App. to Pet. for Cert. 41a; App. 11.[3]

Petitioners, operators of several cable television systems in Oklahoma, filed this suit in March 1981 in the United States District Court for the Western District of Oklahoma, seeking declaratory and injunctive relief. They alleged that the Oklahoma policy violated the Commerce and Supremacy Clauses, the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. Following an evidentiary hearing, the District Court granted petitioners a preliminary injunction and subsequently entered summary judgment and a permanent injunction in December 1981. In granting that relief, the District Court found that petitioners regularly carried out-of-state signals containing wine advertisements, that they were prohibited by federal law from altering or modifying these signals, and that "no feasible way" existed for petitioners to delete the wine advertisements. App. to Pet. for Cert. 40a–41a. Addressing petitioners' First Amendment claim, the District Court applied the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980), and concluded that Oklahoma's advertising ban was an unconstitutional restriction on the cable operators' right to engage in protected commercial speech. App. to Pet. for Cert. 47a–50a. On appeal, the Court of Appeals for the

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[3] Although the Oklahoma statute defines "alcoholic beverage" as "alcohol, spirits, beer, and wine," Okla. Stat., Tit. 37, § 506(2) (1981), the definition of "beer" includes only beverages containing more than 3.2% alcohol by weight, § 506(3). Because beer sometimes contains less than 3.2% alcohol, Oklahoma has determined that beer commercials need not be deleted. At the time this case was brought, hard liquor generally was not advertised on television. Accordingly, enforcement of the advertising ban in this case was limited to requiring that wine commercials be deleted.

Tenth Circuit reversed, holding that, while the wine commercials at issue were protected by the First Amendment, the state ban was a valid restriction on commercial speech. *Oklahoma Telecasters Assn.* v. *Crisp.*, 699 F. 2d 490 (1983).[4] Although the Court of Appeals noted that "Federal Communication[s] Commission regulations and federal copyright law prohibit cable operators from altering or modifying the television signals, including advertisements, they relay to subscribers," the court did not discuss the question whether application of the Oklahoma law to these cable operators was pre-empted by the federal regulations. *Id.*, at 492.

While petitioners' petition for certiorari was pending, a brief was filed for the Federal Communications Commission as *amicus curiae* in which it was contended that the Oklahoma ban on the retransmission of out-of-state signals by cable operators significantly interfered with the existing federal regulatory framework established to promote cable broadcasting. In granting certiorari, therefore, we ordered the parties, in addition to the questions presented by the petitioners concerning commercial speech, to brief and argue the question whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting. 464 U. S. 813 (1983).

Although we do not ordinarily consider questions not specifically passed upon by the lower court, see *California* v. *Taylor*, 353 U. S. 553, 557, n. 2 (1957), this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts. See, *e. g.*, *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320,

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[4] The decision of the Court of Appeals similarly disposed of First Amendment claims asserted by local television broadcasters in a case that was consolidated for purposes of appeal with petitioners' case. *Oklahoma Telecasters Assn.* v. *Crisp*, Nos. Civ. 81–290–W and 81–439–W (WD Okla. 1981), rev'd, 699 F. 2d 490 (1983). These television broadcasters, however, did not petition for certiorari.

n. 6 (1971). Here, the conflict between Oklahoma and federal law was plainly raised in petitioners' complaint, it was acknowledged by both the District Court and the Court of Appeals, the District Court made findings on all factual issues necessary to resolve this question, and the parties have briefed and argued the question pursuant to our order. Under these circumstances, we see no reason to refrain from addressing the question whether the Oklahoma ban as applied here so conflicts with the federal regulatory framework that it is pre-empted.

II

Petitioners and the FCC contend that the federal regulatory scheme for cable television systems administered by the Commission is intended to pre-empt any state regulation of the signals carried by cable system operators. Respondent apparently concedes that enforcement of the Oklahoma statute in this case conflicts with federal law, but argues that because the State's advertising ban was adopted pursuant to the broad powers to regulate the transportation and importation of intoxicating liquor reserved to the States by the Twenty-first Amendment, the statute should prevail notwithstanding the conflict with federal law.[5] As in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), where we held that a California wine-pricing program violated the Sherman Act notwithstanding the State's reliance upon the Twenty-first Amendment in establishing that system, we turn first before assessing the impact of the Twenty-first Amendment to consider whether the Oklahoma statute does in fact conflict with federal law. See *id.*, at 106–114.

Our consideration of that question is guided by familiar and well-established principles. Under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law, *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby "left no room for the States to supplement" federal law, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); and, finally, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Michigan Canners & Freezers Assn.* v. *Agricultural Marketing and Bargaining Board*, *ante*, at 469.

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[5] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

And, as we made clear in *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982):

> "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id.*, at 153–154, quoting *United States* v. *Shimer*, 367 U. S. 374, 383 (1961).

The power delegated to the FCC plainly comprises authority to regulate the signals carried by cable television systems. In *United States* v. *Southwestern Cable Co.*, 392 U. S. 157

(1968), the Court found that the Commission had been given "broad responsibilities" to regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U. S. C. § 152(a), and that this comprehensive authority included power to regulate cable communications systems. 392 U. S., at 177–178. We have since explained that the Commission's authority extends to all regulatory actions "necessary to ensure the achievement of the Commission's statutory responsibilities." *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 706 (1979). Accord, *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 665–667 (1972) (plurality opinion); *id.*, at 675 (BURGER, C. J., concurring in result). Therefore, if the FCC has resolved to pre-empt an area of cable television regulation and if this determination "represents a reasonable accommodation of conflicting policies" that are within the agency's domain, *United States* v. *Shimer, supra*, at 383, we must conclude that all conflicting state regulations have been precluded.[6]

A

In contrast to commercial television broadcasters, which transmit video signals to their audience free of charge and derive their income principally from advertising revenues, cable television systems generally operate on the basis of a wholly different entrepreneurial principle. In return for service fees paid by subscribers, cable operators provide their customers with a variety of broadcast and nonbroadcast signals obtained from several sources. Typically, these sources include over-the-air broadcast signals picked up by a master antenna from local and nearby television broadcasting stations, broadcast signals from distant television stations imported by means of communications satellites, and non-broadcast signals that are not originated by television broadcasting stations, but are instead transmitted specifically for cable systems by satellite or microwave relay. Over the past 20 years, pursuant to its delegated authority under the Communications Act, the FCC has unambiguously expressed its intent to pre-empt any state or local regulation of this entire array of signals carried by cable television systems.

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[6] Relying upon the Court's decision in *FCC* v. *Midwest Video Corp.*, 440 U. S. 689 (1979), respondent contends that the FCC rules and regulations reflecting the agency's intent to pre-empt all state regulation of cable signal carriage violate the First Amendment rights of cable operators by depriving them of editorial control over the signals they carry, and therefore may not be invoked as a basis for pre-emption. We need not consider the merits of this claim, however, since respondent plainly lacks standing to raise a claim concerning his adversaries' constitutional rights in a case in which those adversaries have never advanced such a claim.

The Commission began its regulation of cable communication in the 1960's. At that time, it was chiefly concerned that unlimited importation of distant broadcast signals into the service areas of local television broadcasting stations might, through competition, "destroy or seriously degrade the service offered by a television broadcaster," and thereby cause a significant reduction in service to households not served by cable systems. *Rules re Microwave-Served CATV*, 38 F. C. C. 683, 700 (1965). In order to contain this potential effect, the Commission promulgated rules requiring cable systems[7] to carry the signals of all local stations in their areas, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs were broadcast by the local stations, and to limit their importation of distant broadcast signals into the service areas of the local television broadcasting stations. *CATV*, 2 F. C. C. 2d 725, 745–746, 781–782 (1966). It was with respect to that initial assertion of jurisdiction over cable signal carriage that we confirmed the FCC's general authority under the Communications Act to regulate cable television systems. *United States* v. *Southwestern Cable Co.*, *supra*, at 172–178.

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[7] In its early efforts to regulate the cable industry, the Commission generally referred to CATV, or "community antenna television," which described systems that receive television broadcast signals, amplify them, retransmit them by cable or microwave, and distribute them by wire to subscribers. But, "[b]ecause of the broader functions to be served by such facilities in the future," the FCC subsequently adopted the "more inclusive term cable television systems." *Cable Television Report and Order*, 36 F. C. C. 2d 143, 144, n. 9 (1972). Congress has also adopted this broader terminology. See Copyright Law Revision, H. R. Rep. No. 94–1476, p. 88 (1976).

The Commission further refined and modified these rules governing the carriage of broadcast signals by cable systems in 1972. *Cable Television Report and Order*, 36 F. C. C. 2d 143, on reconsideration, 36 F. C. C. 2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F. 2d 1344 (CA9 1975). In marking the boundaries of its jurisdiction, the FCC determined that, in contrast to its regulatory scheme for television broadcasting stations, it would not adopt a system of direct federal licensing for cable systems. Instead, the Commission announced a program of "deliberately structured dualism" in which state and local authorities were given responsibility for granting franchises to cable operators within their communities and for overseeing such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way. *Cable Television Report and Order*, 36 F. C. C. 2d, at 207. At the same time, the Commission retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards. See *id.*, at 170–176. As the FCC explained in a subsequent order clarifying the scope of its 1972 cable television rules:

> "The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned. Nonetheless, occasionally we receive applications for certificates of compliance which enclose franchises that attempt to delineate the signals to be carried by the franchisee cable operator. *Franchising authorities do not have any jurisdiction or authority*

> *relating to signal carriage.* While the franchisor might want to include a provision requiring the operator to carry all signals allowable under our rules, that is as far as the franchisor can or should go." *Cable Television*, 46 F. C. C. 2d 175, 178 (1974) (emphasis added).[8]

The Commission has also made clear that its exclusive jurisdiction extends to cable systems' carriage of specialized, nonbroadcast signals—a service commonly described as "pay cable." See *id.*, at 199–200.[9]

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[8] The Commission has explicitly defined the contours of both its own jurisdictional authority and that of state and local government:

"[W]e have consistently taken the position that to the degree we deem necessary, we will preempt areas of cable regulation in order to assure the orderly development of this new technology into the national communications structure. . . . The subject areas this agency has preempted include, of course, signal carriage, pay cable, leased channel regulations, technical standards, access, and several aspects of franchisee responsibility. . . . Non-federal officials have responsibility for the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchisee selection and conditions of occupancy and construction." *Duplicative and Excessive Over-Regulation—CATV*, 54 F. C. C. 2d 855, 863 (1975).

[9] The Commission explained its initial decision to pre-empt this area as follows:

"After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development." 46 F. C. C. 2d, at 199–200.

More recently, the Commission has noted that it "has deliberately preempted state regulation of non-basic program offerings, both nonbroadcast programs and broadcast programs delivered to distant markets by satellite. While the nature of that non-basic offering was (and still is) developing, the preemptive intent, and the reasons for that preemption, are clear and discernible. Today, the degree of diversity in satellite-delivered program services reflects the wisdom of freeing cable systems from burdensome state and local regulation in this area." *Community Cable TV, Inc.*, FCC 83–525, p. 13 (released Nov. 15, 1983).

Although the FCC has recently relaxed its regulation of importation of distant broadcast signals to permit greater access to this source of programming for cable subscribers, it has by no means forsaken its regulatory power in this area. See *CATV Syndicated Program Exclusivity Rules*, 79 F. C. C. 2d 663 (1980), aff'd *sub nom. Malrite T. V. of New York* v. *FCC*, 652 F. 2d 1140 (CA2 1981), cert. denied *sub nom. National Football League* v. *FCC*, 454 U. S. 1143 (1982). Indeed, the Commission's decision to allow unfettered importation of distant broadcast signals rested on its conclusion that "the benefits to existing and potential cable households from permitting the carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities." 79 F. C. C. 2d, at 746. See also Besen & Crandall, The Deregulation of Cable Television, 44 Law & Contemp. Prob. 77 (Winter 1981). As the Court of Appeals for the Second Circuit observed in upholding this decision, "[by] shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity . . . ." *Malrite T. V. of New York* v. *FCC*, *supra*, at 1151. Clearly, the full accomplishment of such objectives would be jeopardized if state and local authorities were now permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers.

Accordingly, to the extent it has been invoked to control the distant broadcast and nonbroadcast signals imported by cable operators, the Oklahoma advertising ban plainly reaches beyond the regulatory authority reserved to local authorities by the Commission's rules, and trespasses into the exclusive domain of the FCC. To be sure, Oklahoma may, under current Commission rules, regulate such local aspects of cable systems as franchisee selection and construction oversight, see, *e. g.*, *Duplicative and Excessive Over-*

Regulation—CATV, 54 F. C. C. 2d 855, 863 (1975), but, by requiring cable television operators to delete commercial advertising contained in signals carried pursuant to federal authority, the State has clearly exceeded that limited jurisdiction and interfered with a regulatory area that the Commission has explicitly pre-empted.[10]

B

Quite apart from this generalized federal pre-emption of state regulation of cable signal carriage, the Oklahoma advertising ban plainly conflicts with specific federal regulations. These conflicts arise in three principal ways. First, the FCC's so-called "must-carry" rules require certain cable television operators to transmit the broadcast signals of any local television broadcasting station that is located within a specified 35-mile zone of the cable operator or that is "significantly viewed" in the community served by the operator. 47 CFR §§76.59(a)(1) and (6) (1983). These "must-carry" rules require many Oklahoma cable operators, including petitioners, to carry signals from broadcast stations located in nearby States such as Missouri and Kansas. See App. 22, 35. In addition, under Commission regulations, the local broadcast signals that cable operators are required to carry must be carried "in full, without deletion or alteration of any portion." 47 CFR §76.55(b) (1983). Because, in the Commission's view, enforcement of these nondeletion rules serves to "prevent a loss of revenues to local broadcasters sufficient to result in reduced service to the public," they have been applied to commercial advertisements as well as to regular programming. *In re Pugh*, 68 F. C. C. 2d 997, 999 (1978); *WAPA-TV Broadcasting Corp.*, 59 F. C. C. 2d 263, 272 (1976); *CATV*, 15 F. C. C. 2d 417, 444 (1968); *CATV*, 2 F. C. C. 2d, at 753, 756. Consequently, those Oklahoma cable operators required by federal law to carry out-of-state broadcast signals in full, including any wine commercials, are subject to criminal prosecution under Oklahoma law as a result of their compliance with federal regulations.

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[10] For that reason our decision in *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U. S. 424 (1963), is not controlling here. In that case, we concluded that a State's authority to ban price-related broadcast advertising for eyeglasses was not pre-empted by the Communications Act, principally because "[n]o specific federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it." *Id.*, at 432 (footnote omitted). Here, by contrast, the FCC's pre-emptive intent could not be more explicit or unambiguous.

Second, current FCC rulings permit, and indeed encourage, cable television operators to import out-of-state television broadcast signals and retransmit those signals to their subscribers. See *CATV Syndicated Program Exclusivity Rules*, 79 F. C. C. 2d, at 745–746. For Oklahoma cable operators, this source of cable programming includes signals from television broadcasting stations located in Kansas, Missouri, and Texas, as well as the signals from so-called "superstations" in Atlanta and Chicago. App. 21, 35–36. It is undisputed that many of these distant broadcast signals retransmitted by petitioners contain wine commercials that are lawful under federal law and in the States where the programming originates. Nor is it disputed that cable operators who carry such signals are barred by Commission regulations from deleting or altering any portion of those signals, including commercial advertising. 47 CFR § 76.55(b) (1983). Under Oklahoma's advertising ban, however, these cable operators must either delete the wine commercials or face criminal prosecution. Since the Oklahoma law, by requiring deletion of a portion of these out-of-state signals, compels conduct that federal law forbids, the state ban clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal regulatory scheme. *Hines* v. *Davidowitz*, 312 U. S., at 67; *Farmers Union* v. *WDAY, Inc.*, 360 U. S. 525, 535 (1959).

Finally, enforcement of the state advertising ban against Oklahoma cable operators will affect a third source of cable programming over which the Commission has asserted exclusive jurisdiction. Aside from relaying local television broadcasting in accordance with the "must-carry" rules, and distant broadcast signals, cable operators also transmit specialized nonbroadcast cable services to their subscribers. This source of programming, often referred to as "pay cable," includes such advertiser-supported national cable programming as the Cable News Network (CNN) and the Entertainment and Sports Programming Network (ESPN). Although the Commission's "must-carry" and nondeletion rules do not apply to such nonbroadcast cable services, the FCC, as noted earlier, see *supra*, at 703, has explicitly stated that state regulation of these services is completely precluded by federal law.[11]

Petitioners generally receive such signals by antenna, microwave receiver, or satellite dish and restransmit them by wire to their subscribers. But, unlike local television broadcasting stations that transmit only one signal and receive notification from their networks concerning advertisements, cable operators simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the timing or content of commercial advertisements carried on those signals. Cf. n. 2, *supra*. As the record of this case indicates, developing the capacity to monitor each signal and delete every wine commercial before it is retransmitted would be a prohibitively burdensome task. App. 25–26, 36–38. Indeed, the District Court specifically found that, in view of these considerations, "[t]here exists no feasible way for [cable operators] to block out the

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[11] See *Community Cable TV, Inc.*, FCC 83–525, pp. 11–14 (released Nov. 15, 1983); *Duplicative and Excessive Over-Regulation—CATV*, 54 F. C. C. 2d, at 861–863; *Cable Television*, 46 F. C. C. 2d, at 199–200; *Time-Life Broadcast, Inc.*, 31 F. C. C. 2d 747 (1971); *Federal Preemption of CATV Regulations*, 20 F. C. C. 2d 741 (1969).

[wine] advertisements." App. to Pet. for Cert. 41a.[12] Accordingly, if the state advertising ban is enforced, Oklahoma cable operators will be compelled either to abandon altogether their carriage of both distant broadcast signals and specialized nonbroadcast cable services or run the risk of criminal prosecution. As a consequence, the public may well be deprived of the wide variety of programming options that cable systems make possible.

Such a result is wholly at odds with the regulatory goals contemplated by the FCC. Consistent with its congressionally defined charter to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and world-wide wire and radio communication service . . .," 47 U. S. C. § 151, the FCC has sought to ensure that "the benefits of cable communications become a reality on a nationwide basis." *Duplicative and Excessive Over-Regulation—CATV*, 54 F. C. C. 2d, at 865. With that end in mind, the Commission has determined that only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country. While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC's care, and we see no reason to disturb the agency's judgment. And, as we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, "States are not permitted to use their police power to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 178 (1978); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 774

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[12] At one time, the FCC itself considered a proposal to permit cable systems to substitute commercial advertisements on distant signals, but concluded that such a plan was not feasible. *Cable Television Report and Order*, 36 F. C. C. 2d, at 165.

(1947). Cf. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta,* 458 U. S., at 155 (Federal Home Loan Bank Board explicitly pre-empted state due-on-sale clauses in order to afford flexibility and discretion to federal savings and loan institutions).

C

Although the FCC has taken the lead in formulating communications policy with respect to cable television, Congress has considered the impact of this new technology, and has, through the Copyright Revision Act of 1976, 90 Stat. 2541, 17 U. S. C. § 101 *et seq.*, acted to facilitate the cable industry's ability to distribute broadcast programming on a national basis. Prior to the 1976 revision, the Court had determined that the retransmission of distant broadcast signals by cable systems did not subject cable operators to copyright infringement liability because such retransmissions were not "performances" within the meaning of the 1909 Copyright Act. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968). In revising the Copyright Act, however, Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement. At the same time, Congress recognized that "it would be impractical and unduly burdensome to require every cable system to negotiate [appropriate royalty payments] with every copyright owner" in order to secure consent for such retransmissions. Copyright Law Revision, H. R. Rep. No. 94–1476, p. 89 (1976).[13] Section 111 of the 1976 Act codifies the solution devised by Congress. It establishes a program of compulsory copyright licensing that permits cable systems to retransmit distant broadcast signals without securing permission from the copyright owner and, in turn, requires each system to pay royalty fees to a central royalty fund based on a percentage of its gross revenues.[14] To take advantage of this compulsory licensing scheme, a cable operator must satisfy certain reporting requirements, §§111(d)(1) and (2)(A), pay specified royalty fees to a central fund administered by the Register of Copyrights, §§111(d)(2)(B)–(D) and (3), and refrain from deleting or altering commercial advertising on the broadcast signals it transmits, §111(c)(3). Failure to comply with these conditions results in forfeiture of the protections of the compulsory licensing system.

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[13] In developing this approach, Congress was aware that cable operators would face virtually insurmountable technical and logistical problems if they were required to block out all programs as to which they had not directly obtained copyright permission from the owner. See, *e. g.*, Copyright Law Revision, Hearings on H. R. 2223 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., pt. 2, p. 758 (1975);

In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U. S. Const., Art. I, §8, cl. 8, of rewarding the creators of copyrighted works and of "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975) (footnote omitted); *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 428–429 (1984). Compulsory licensing not only protects the commercial value of copyrighted

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Copyright Law Revision: Hearings on S. 1361 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 291–292, 400–401 (1973).

[14] The keystone of this system, §111(c)(1), provides:

"Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U. S. C. §111(c)(1).

works but also enhances the ability of cable systems to retransmit such programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals.[15] By requiring cable operators to delete commercial advertisements for wine, however, the Oklahoma ban forces these operators to lose the protections of compulsory licensing. Of course, it is possible for cable systems to comply with the Oklahoma ban by simply abandoning their importation of the distant broadcast signals covered by the Copyright Act. But such a loss of viewing options would plainly thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals.

III

Respondent contends that even if the Oklahoma advertising ban is invalid under normal pre-emption analysis, the fact that the ban was adopted pursuant to the Twenty-first

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[15] As the House Committee Report explained:

"In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC." H. R. Rep. No. 94–1476, p. 89 (1976).

See also H. R. Conf. Rep. No. 94–1733, pp. 75–76 (1976); 122 Cong. Rec. 31979 (1976) (remarks of Rep. Kastenmeier); *id.*, at 31984 (remarks of Rep. Railsback); *id.*, at 32009 (remarks of Rep. Danielson); *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F. 2d 125, 132–133 (CA2 1982) (discussing Congress' decision to establish "a compulsory licensing program to insure that [cable systems] could continue bringing a diversity of broadcasted signals to their subscribers").

Amendment rescues the statute from pre-emption. A similar claim was advanced in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc*, 445 U. S. 97 (1980). In that case, after finding that a California wine-pricing program violated the Sherman Act, we considered whether § 2 of the Twenty-first Amendment, which reserves to the States certain power to regulate traffic in liquor, "permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition." 445 U. S., at 106. Here, we must likewise consider whether § 2 permits Oklahoma to override the federal policy, as expressed in FCC rulings and regulations, in favor of promoting the widespread development of cable communication.

The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939). At the same time, our prior cases have made clear that the Amendment does not license the States to ignore their obligations under other provisions of the Constitution. See, *e. g., Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982); *California* v. *LaRue*, 409 U. S. 109, 115 (1972); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341, 345–346 (1964). Indeed, "[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). Thus, as the Court explained in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964), § 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause. *Id.*, at 330; *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62–63 (1936). We have cautioned, however, that "[t]o draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce

Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Hostetter, supra,* at 331–332. Notwithstanding the Amendment's broad grant of power to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor. *Ibid.* See also *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc., supra,* at 109–110; *Nippert* v. *Richmond,* 327 U. S. 416, 425, n. 15 (1946); *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293 (1945).

In rejecting the claim that the Twenty-first Amendment ousted the Federal Government of all jurisdiction over interstate traffic in liquor, we have held that when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail. In *Hostetter,* for example, the Court found that in-state sales of intoxicating liquor intended to be used only in foreign countries could be made under the supervision of the Federal Bureau of Customs, despite contrary state law, because the state regulation was not aimed at preventing unlawful use of alcoholic beverages within the State, but rather was designed "totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." 377 U. S., at 333–334. Similarly, in *Midcal Aluminum, supra,* we found that "the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program," because the State's interest in promoting temperance through the program was not substantial and was therefore clearly outweighed by the important federal objectives of the Sherman Act. 445 U. S., at 113–114.

Of course, our decisions in *Hostetter* and *Midcal Aluminum* were concerned only with conflicting state and federal efforts to regulate transactions involving liquor. In this case, by contrast, we must resolve a clash between an express federal decision to pre-empt all state regulation of cable signal carriage and a state effort to apply its ban on alcoholic beverage advertisements to wine commercials contained in out-of-state signals carried by cable systems. Nonetheless, the central question presented in those cases is essentially the same as the one before us here: whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies. As in *Hostetter* and *Midcal Aluminum,* resolution of this question requires a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case. 445 U. S., at 109.

There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers. See, *e. g., CATV Syndicated Program Exclusivity Rules,* 79 F. C. C. 2d, at 744–746. To accomplish this regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems. In the Commission's view, uniform national communications policy with respect to cable systems would be undermined if state and local governments were permitted to regulate in piecemeal fashion the signals carried by cable operators pursuant to federal authority. See *Community Cable TV, Inc.,* FCC 83–525, pp. 12–13 (released Nov. 15, 1983); *Cable Television,* 46 F. C. C. 2d, at 178.

On the other hand, application of Oklahoma's advertising ban to out-of-state signals carried by cable operators in that

State is designed principally to further the State's interest in discouraging consumption of intoxicating liquor. See 11 Op. Okla. Atty. Gen. No. 79–334, p. 550 (Mar. 19, 1980). Although the District Court found that "[c]onsumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages," App. to Pet. for Cert. 42a, we may nevertheless accept Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State. The modest nature of Oklahoma's interests may be further illustrated by noting that Oklahoma has chosen not to press its campaign against alcoholic beverage advertising on all fronts. For example, the State permits both print and broadcast commercials for beer, as well as advertisements for all alcoholic beverages contained in newspapers, magazines, and other publications printed outside of the State. The ban at issue in this case is directed only at wine commercials that occasionally appear on out-of-state signals carried by cable operators. By their own terms, therefore, the State's regulatory aims in this area are narrow. Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here. In contrast to state regulations governing the conditions under which liquor may be imported or sold within the State, therefore, the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal Aluminum*, 445 U. S., at 110.

When this limited interest is measured against the significant interference with the federal objective of ensuring widespread availability of diverse cable services throughout the United States—an objective that will unquestionably be frustrated by strict enforcement of the Oklahoma statute—it is clear that the State's interest is not of the same stature as the goals identified in the FCC's rulings and regulations. As in *Midcal Aluminum*, therefore, we hold that when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.[16]

IV

We conclude that the application of Oklahoma's alcoholic beverage advertising ban to out-of-state signals carried by cable operators in that State is pre-empted by federal law and that the Twenty-first Amendment does not save the regulation from pre-emption. The judgment of the Court of Appeals is

Reversed.

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[16] Because we have resolved the pre-emption and Twenty-first Amendment issues in petitioners' favor, we need not consider the additional question whether Oklahoma's advertising ban constitutes an invalid restriction on protected commercial speech, and we therefore express no view on that issue.

PENSION BENEFIT GUARANTY CORPORATION *v.* R. A. GRAY & CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-245. Argued April 16, 1984—Decided June 18, 1984*

The Employee Retirement Income Security Act (ERISA), enacted in 1974, created a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, collects insurance premiums from covered private retirement pension plans and provides benefits to participants if their plan terminates with insufficient assets to support its guaranteed benefits. For multiemployer pension plans, the PBGC's payment of guaranteed benefits was not to become mandatory until January 1, 1978. During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of such plans. If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to PBGC in amounts proportional to their share of the plan's contributions during that period. As the mandatory coverage date approached, Congress became concerned that a significant number of multiemployer pension plans were experiencing extreme financial hardship that would result in termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. Ultimately, after deferring the mandatory coverage until August 1, 1980, and extensively debating the issue of withdrawal liability in 1979 and 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." These withdrawal liability provisions were made to take effect approximately five months before the statute was enacted into law. When appellee building and construction firm, within this 5-month period, withdrew from a multiemployer pension plan that it had been contributing to under collective-bargaining agreements with a labor union, the pension plan notified appellee that it had incurred a withdrawal liability and demanded

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*Together with No. 83-291, *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R. A. Gray & Co.*, also on appeal from the same court.

payment. Appellee then filed suit in Federal District Court, seeking declaratory and injunctive relief against the pension plan and the PBGC and claiming, *inter alia*, that the retroactive application of the MPPAA violated the Due Process Clause of the Fifth Amendment. The District Court rejected this claim and granted summary judgment in favor of the pension plan and the PBGC. The Court of Appeals reversed, holding that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA and because the equities generally favored appellee over the pension plan.

Held: Application of the withdrawal liability provisions of the MPPAA during the 5-month period prior to the statute's enactment does not violate the Due Process Clause of the Fifth Amendment. Pp. 728–734.

(a) The burden of showing that retroactive legislation complies with due process is met by showing that retroactive application of the legislation is justified by a rational legislative purpose. Here, it was rational for Congress to conclude that the MPPAA's purposes could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems that Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer pension plans, and Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of the lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Pp. 728–731.

(b) It is doubtful that retroactive application of the MPPAA would be invalid under the Due Process Clause even if it was suddenly enacted without any period of deliberate consideration. But even assuming that advance notice of retroactive legislation is constitutionally compelled, employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA impose contingent liability, but the various legislative proposals debated by Congress before the MPPAA was enacted uniformly included retroactive effective dates. Pp. 731–732.

(c) The principles embodied in the Fifth Amendment's Due Process Clause have never been held coextensive with prohibitions existing against state impairments of pre-existing contracts. Rather, the limitations imposed on States by the Contract Clause have been contrasted with the less searching standards imposed on economic legislation by the Due Process Clauses. Pp. 732–733.

(d) Unlike the statute invalidated in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, which required employers to finance pensions for former employees who had already been fully compensated while employed, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal. Pp. 733–734.

705 F. 2d 1502, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Baruch A. Fellner argued the cause for appellants in both cases. With him on the briefs for appellant in No. 83–245 were *Henry Rose, Mitchell L. Strickler, J. Stephen Caflisch, Peter H. Gould, David F. Power, Nathan Lewin,* and *Seth P. Waxman. William B. Crow, James N. Westwood, William H. Walters,* and *David S. Paull* filed briefs for appellant in No. 83–291.

Thomas M. Triplett argued the cause and filed a brief for appellee.†

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a 5-month period prior to the statute's enactment violates the Due Process Clause of the Fifth Amendment. We hold that it does not.

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†*Gerald M. Feder* filed a brief for the National Coordinating Committee for Multiemployer Plans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for G & R Roofing Co. by *Michael E. Merrill, Stephen J. Schultz,* and *Mark T. Bennett;* for the National Association of Wholesaler-Distributors by *Harold T. Halfpenny;* for the National Association of Manufacturers by *Chester W. Nosal, John R. Keys, Jr., Jan S. Amundson,* and *Quentin Riegel;* for the National-American Wholesale Grocers' Association by *William H. Borghesani, Jr.,* and *Peter A. Susser;* for the National Steel Service Center, Inc., by *Ralph T. DeStefano* and *Richard R. Riese;* for Republic Industries, Inc., by *Philip B. Kurland, Christopher G. Walsh, Jr., Lester M. Bridgeman,* and *Louis T. Urbanczyk;* for Sibley, Lindsay & Curr Co. by *William L. Dorr;* and for Transport Motor Express, Inc., et al. by *Harris Weinstein.*

Jack L. Whitacre and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

I

A

In 1974, after careful study of private retirement pension plans, Congress enacted the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.* Among the principal purposes of this "comprehensive and reticulated statute" was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 361–362, 374–375 (1980). See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 510–511 (1981). Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman, supra,* at 375; *Alessi, supra,* at 510.

Toward this end, Title IV of ERISA, 29 U. S. C. § 1301 *et seq.*, created a plan termination insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation within the Department of Labor, § 1302. The PBGC collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits. See §§ 1322, 1361. For pension plans maintained by single employers, the PBGC's obligation to pay benefits took effect immediately upon enactment of ERISA in 1974. §§ 1381(a), (b). For multiemployer pension plans, however, the payment of guaranteed benefits by the PBGC was not to become mandatory until January 1, 1978. § 1381(c)(1).

During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of multiemployer pension plans. §§ 1381(c)(2)–(4). If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their share of the plan's contributions during that period. § 1364. In other words, any employer withdrawing from a multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits. In addition, any individual employer's liability was not to exceed 30% of the employer's net worth. § 1362(b)(2).

As the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. To avoid this potential collapse of the plan termination insurance program, Congress deferred mandatory insurance coverage for multiemployer plans for 18 months—until July 1, 1979—extending the PBGC's discretionary authority to insure plans terminating during the interim. Pub. L. 95–214, 91 Stat. 1501.[1] The PBGC was also directed to prepare a comprehensive report analyzing the problems faced by multiemployer plans and recommending appropriate legislative action. See S. Rep. No. 95–570, pp. 1–4 (1977); H. R. Rep. No. 95–706, p. 1

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[1] The effective date for mandatory insurance coverage of multiemployer plans was subsequently deferred to May 1, 1980, Pub. L. 96–24, 93 Stat. 70, to July 1, 1980, Pub. L. 96–239, 94 Stat. 341, and finally to August 1, 1980, Pub. L. 96–293, 94 Stat. 610. On each occasion, Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans. Ultimately, mandatory insurance coverage was superseded by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1208.

(1977). In this way, Congress created "time to legislate, if necessary, before the mandatory coverage comes into effect." 123 Cong. Rec. 36800 (1977) (statement of Sen. Williams); *id.*, at 36800–36802.

The PBGC issued its report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95–214 (1978). Among its principal findings was that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans. As the report summarized:

> "The basic problem with the withdrawal rules is that they are designed primarily to protect PBGC. They do not provide an efficient mechanism for reducing the burden of withdrawal on the plan and remaining employers. They may even encourage withdrawals in some instances (*e. g.*, where termination may be imminent). Changes in the withdrawal rules should be considered:
>
> "(1) to provide relief to plans without increasing the burden on the insurance system,
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> "(2) to provide a disincentive to voluntary employer withdrawals,
>
> "(3) to reduce or remove disincentives to plan entry, and
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> "(4) to work with, instead of against, the termination liability provisions." *Id.*, at 96–97.[2]

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[2] Congressional testimony by the Executive Director of the PBGC further explained the problems caused by employers withdrawing from multiemployer plans:

"A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the

To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation. *Id.*, at 97–114.[3] These tentative proposals were included in policy recommendations submitted to Congress on February 27, 1979, and were incorporated in proposed legislation that the Executive Branch formally sent to Congress three months later, S. 1076, 96th Cong., 1st Sess. (1979). Most significantly for present purposes, the bill included an effective date for withdrawal liability of February 27, 1979—the date on which the PBGC had initially submitted its recommendations to Congress. *Id.*, § 108. This date was chosen to prevent employers from avoiding the adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered by Congress. As one Senator noted, the retroactive effective date was designed "to prevent . . . the withdrawal of these opportunistic employers without imposition of liability" and was to

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inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind).

[3] Again, the PBGC's Executive Director provided a more elaborate explanation:

"To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .

"We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." *Id.*, at 23 (statement of Matthew M. Lind).

serve "as a deterrent to hasty employer withdrawal." 126 Cong. Rec. 20234 (1980) (remarks of Sen. Matsunaga).

Congress debated the issue of withdrawal liability for the remainder of 1979 and much of 1980. By April 1980, two Committees in the House and one in the Senate had approved substantially similar versions of the bill, each containing the February 27, 1979, effective date for withdrawal liability. The Senate Finance Committee had not yet completed its work on the bill, however, and sought more time for consideration of the legislation. See *supra*, at 721, and n. 1. At the same time, the Senate advanced the effective date for imposing withdrawal liability to April 29, 1980. As Senator Javits later explained:

> "The committees decided in part to move up the date from February 27, 1979, the date contained in earlier versions of the bill, because the original purpose of a retroactive effective date—namely, to avoid encouragement of employer withdrawals while the bill was being considered—has been achieved. It should also be noted that the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date. I realize that permitting these employers to avoid liability only increases the burdens of those employers remaining with the plans in question, but it appears necessary to accept the April 29 date in order to enact the bill before the August 1 deadline for action." 126 Cong. Rec. 20179 (1980) (statement of Sen. Javits).

See also *id.*, at 9236–9237 (statement of Sen. Bentsen).

The House unanimously passed its version of the bill, including the February 27, 1979, effective date, in May 1980. *Id.*, at 12233. The Senate version, adopting an effective date of April 29, 1980, was endorsed by a vote of 85–1. *Id.*, at 20247. The Conference Committee accepted the Senate's effective date, and the legislation was signed into law by the President on September 26, 1980. Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), Pub. L. 96–364, 94 Stat. 1208. As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U. S. C. §§ 1381, 1391. Pursuant to 29 U. S. C. § 1461(e), these withdrawal liability provisions took effect on April 29, 1980, approximately five months before the statute was enacted into law.

B

Appellee R. A. Gray & Co. (Gray) is a building and construction firm doing business in Oregon. Under a series of collective-bargaining agreements with the Oregon State Council of Carpenters (Council), Gray contributed to the Oregon-Washington Carpenters-Employers Pension Trust Fund (Pension Plan), a multiemployer pension plan under 29 U. S. C. § 1301(a)(3). During February 1980, Gray advised the Council that it would be terminating their collective-bargaining agreement when it expired on June 1, 1980. Gray continued to engage in the building and construction industry, however, and therefore was deemed to have completely withdrawn from the Pension Plan pursuant to § 1383(b).

The Pension Plan subsequently notified Gray that, by completely withdrawing from the plan on June 1, 1980, it had incurred a withdrawal liability of $201,359. The notice set forth a schedule of quarterly payments and demanded payment in accordance with that schedule. After some preliminary correspondence between Gray and the plan's trustees, the Pension Plan informed Gray that it was delinquent in its payments. Gray thereafter filed suit in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief against the Pension Plan and the PBGC.[4]

Gray's complaint raised several constitutional claims, including a challenge to the retroactive application of the MPPAA under the Due Process Clause of the Fifth Amendment.[5] In particular, Gray noted that its June 1, 1980, withdrawal from the Pension Plan occurred during the 5-month period preceding enactment of the MPPAA, and therefore was directly affected by the retroactivity provision included in the Act. Moreover, Gray contended, retroactive application of withdrawal liability could not be sustained under the Due Process Clause because it was arbitrary and irrational, and because it impaired the collective-bargaining agreements that Gray had signed with the Council.

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[4] Gray also moved for a preliminary injunction to restrain the Pension Plan from taking any further steps to collect the withdrawal liability it assessed. The District Court denied that motion. App. 50–57.

At the same time, Gray requested that the Pension Plan review its determination of withdrawal liability. See 29 U. S. C. § 1399(b)(2). In response, the Pension Plan issued a "Decision on Review," concluding that it had "accurately determined: (1) the method for allocating the unfunded vested benefits to Gray, (2) the amount of the Plan's unfunded vested benefits, (3) the schedule of payments offered to Gray, and (4) the date of Gray's complete withdrawal." 549 F. Supp. 531, 534 (Ore. 1982). Although Gray could have initiated arbitration with the Pension Plan on these issues, 29 U. S. C. § 1401(a), it accepted these findings and waived its right to arbitration, 549 F. Supp., at 534.

[5] Gray also contended, *inter alia*, that the different treatment afforded employers participating in multiemployer pension plans as opposed to employers participating in single-employer pension plans violates the equal protection component of the Fifth Amendment, that retroactive application of the MPPAA violates the *Ex Post Facto* Clause included in Art. I, § 9, of the Constitution, and that the Act's arbitration provisions violated Gray's rights to procedural due process and trial by jury. The District Court rejected the first two claims, see 549 F. Supp., at 538–539, and refused to reach the last claim because Gray had waived its right to arbitration, *id.*, at 539; n. 4, *supra*. These issues were not reached by the Court of Appeals, *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corp.*, 705 F. 2d 1502, 1515 (CA9 1983), and are not now pressed before this Court.

The District Court rejected Gray's due process claim, and granted summary judgment in favor of the Pension Plan and the PBGC. 549 F. Supp. 531 (1982). Specifically, the court analyzed the constitutionality of retroactively imposing withdrawal liability on employers by applying a four-part test established by the Court of Appeals for the Seventh Circuit in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F. 2d 947 (1979), aff'd on statutory grounds, 446 U. S. 359 (1980). As that test requires, the court examined (1) the reliance interest of the affected parties, (2) whether the interest impaired is in an area previously subjected to regulatory control, (3) the equities of imposing the legislative burdens, and (4) the statutory provisions that limit and moderate the impact of the burdens imposed.[6] Under these criteria, the court concluded that Gray had not satisfied the heavy burden faced by parties attempting to demonstrate that Congress has acted arbitrarily and irrationally when enacting socioeconomic legislation.

The Court of Appeals for the Ninth Circuit reversed, although it too believed that the four-factor *Nachman* test was the appropriate standard to use when analyzing the constitutionality of retroactive legislation enacted by Congress. *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corp.*,

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[6] The court in *Nachman* developed this four-part test for reviewing the constitutionality of retroactive legislation under the Fifth Amendment's Due Process Clause primarily by relying upon this Court's decisions in *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978), and *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). For reasons explained below, however, we do not believe that these cases control judicial review of retroactive federal legislation affecting economic benefits and burdens. See *infra*, at 732–734. We therefore reject the constitutional underpinnings of the analysis employed by the Court of Appeals in *Nachman*, although we have no occasion to consider whether the factors mentioned by that court might in some circumstances be relevant in determining whether retroactive legislation is rational. Cf. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 367–368, and n. 12 (1980) (explicitly limiting our review to the statutory question presented).

705 F. 2d 1502 (1983). In particular, the court concluded that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA, *id.*, at 1511–1512, and because the equities in this action generally favored Gray over the Pension Plan, *id.*, at 1512–1514

Both the Pension Plan and the PBGC invoked the appellate jurisdiction of this Court under 28 U. S. C. § 1252. We noted probable jurisdiction, 464 U. S. 912 (1983),[7] and now reverse.

II

The starting point for analysis is our decision in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). In *Turner Elkhorn*, we considered a constitutional challenge to the retroactive effects of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972. Under Title IV of that Act, coal mine operators were required to compensate former employees disabled by pneumoconiosis even though those employees had terminated their work in the industry before the statute was enacted. We nonetheless had little difficulty in upholding the statute against constitutional attack under the Due Process Clause. As we initially noted:

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[7] At least three Courts of Appeals, as well as numerous District Courts, have concluded that retroactive application of the MPPAA's withdrawal liability provisions satisfies constitutional standards. See, *e. g.*, *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F. 2d 843 (CA2 1984); *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F. 2d 1247 (CA7 1983), cert. pending, No. 83–1246; *Republic Industries, Inc.* v. *Teamsters Joint Council*, 718 F. 2d 628 (CA4 1983), cert. pending, No. 83–541.

The prospective application of the MPPAA's withdrawal liability provisions has also been the subject of extensive nationwide litigation. All of the Courts of Appeals addressing the various constitutional challenges raised in those cases, however, have upheld the statute. See, *e. g.*, *The Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 235 U. S. App. D. C. 1, 729 F. 2d 1502 (1984); *Peick* v. *Pension Benefit Guaranty Corp.*, *supra*; *Republic Industries, Inc.* v. *Teamsters Joint Council*, *supra*. Because these issues were not addressed by the Court of Appeals, cf. n. 5, *supra*, and are not actively pursued by the parties before this Court, we assume for purposes of our decision in these cases that the prospective effects of the Act satisfy constitutional standards.

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955)." 428 U. S., at 15.

We further explained that the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches:

> "[I]nsofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect—although, as we have noted, the Act imposed no liability on operators until [after its enactment]. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935); *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934); *Louisville*

> *& Nashville R. Co.* v. *Mottley*, 219 U. S. 467 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter* v. *United States*, 334 U. S. 742 (1948); *Welch* v. *Henry*, 305 U. S. 134 (1938); *Funkhouser* v. *Preston Co.*, 290 U. S. 163 (1933)." *Id.*, at 15–16 (footnotes omitted).

To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.*, at 16–17. But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

For example, in *Turner Elkhorn* we found that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.*, at 18. Similarly, in these cases, a rational legislative purpose supporting the retroactive application of the MPPAA's withdrawal liability provisions is easily identified. Indeed, Congress was quite explicit when explaining the reason for the statute's retroactivity.

In particular, we believe it was eminently rational for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. See 126 Cong. Rec. 20179 (1980) (statement of Sen. Javits); *id.*, at 20244 (remarks of Sen. Matsunaga). See also *supra*, at 723–724. Withdrawals occurring during the legislative process not only would have required that remaining employers increase their contributions to existing pension plans, but also could have ultimately affected the stability of the plans themselves. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Indeed, as the amendments progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period that Congress believed would be necessary to accomplish its purposes. As we recently noted when upholding the retroactive application of an income tax statute in *United States* v. *Darusmont*, 449 U. S. 292, 296–297 (1981) *(per curiam)*, the enactment of retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation . . . is a customary congressional practice." We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation under the Fifth Amendment's Due Process Clause.

III

Gray and its supporting *amici* offer several reasons for subjecting the retroactive application of the MPPAA to some form of heightened judicial scrutiny. We are not persuaded, however, by any of their arguments.

First, Gray contends that retroactive legislation does not satisfy due process requirements unless persons affected by the legislation had "notice" of changing legal circumstances and "an opportunity to conform their conduct to the requirements of [the] new legislation." Brief for Appellee 20. We have doubts, however, that retroactive application of the

MPPAA would be invalid under the Due Process Clause for lack of notice even if it was suddenly enacted by Congress without any period of deliberate consideration, as often occurs with floor amendments or "riders" added at the last minute to pending legislation. But even assuming that advance notice of legislative action with retrospective effects is constitutionally compelled, cf. *Darusmont*, *supra*, at 299 (similarly assuming that notice is a relevant consideration), we believe that employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA itself impose contingent liability on withdrawing employers, but the various legislative proposals debated by Congress before enactment of the MPPAA uniformly included retroactive effective dates among their provisions. See *supra*, at 723–725.[8]

Second, it is suggested that we apply constitutional principles that have been developed under the Contract Clause, Art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."), when reviewing this federal legislation.[9] See, *e. g.*, *Energy Resources*

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[8] See, *e. g.*, *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F. 2d, at 852 ("Notice was everywhere. . . . [Employers] withdrew from their funds not only when pervasive regulation, including withdrawal liability under ERISA, existed in the pension field, but also when the advent of the MPPAA was imminent"); *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F. 2d, at 1269 ("[T]he intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process. . . . [E]mployers who withdrew during [the retrospective] period cannot argue that they are now being required to pay wholly unanticipated liabilities") (footnote omitted).

[9] It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause:

"MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from im-

Group, Inc. v. *Kansas Power & Light Co.*, 459 U. S. 400 (1983); *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978). We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. See, *e. g.*, *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. See *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 17, n. 13 (1977). And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,'" *ibid.* (quoting *Welch* v. *Henry*, 305 U. S. 134, 147 (1938), and citing *Turner Elkhorn*, 428 U. S., at 14–20), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.

Finally, Gray urges that we resuscitate the Court's 1935 decision in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, which invalidated provisions of the Railroad Retirement Act of 1934 that required employers to finance pensions for former railroad employees. Assuming, as we did in *Turner Elkhorn*, *supra*, at 19, that this aspect of *Alton* "retains vitality" despite the changes in judicial review of economic legislation that have occurred in the ensuing years, we again find it distinguishable from the present litigation. Unlike the statute in *Alton*, which created pensions for employees who had been fully compensated while working for

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pairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded." 5 J. Elliot, Debates on the Federal Constitution 546 (2d ed. 1876).

See 2 M. Farrand, Records of the Federal Convention of 1787, p. 619 (1911).

the railroads, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal.

IV

We conclude that Congress' decision to apply the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act to employers withdrawing from pension plans during the 5-month period preceding enactment of the Act is supported by a rational legislative purpose, and therefore withstands attack under the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

SECURITIES AND EXCHANGE COMMISSION ET AL. *v.* JERRY T. O'BRIEN, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-751. Argued April 17, 1984—Decided June 18, 1984

During its nonpublic investigation into possible violations of the federal securities laws involving respondents, the Securities and Exchange Commission (SEC) issued subpoenas to certain of the respondents for the production of financial records. Ultimately, respondents filed suit in Federal District Court to enjoin the SEC's investigation and to prevent compliance with some of the subpoenas. After the District Court dismissed the claims for injunctive relief, the SEC issued subpoenas to third parties. Respondents then renewed their requests to the District Court for injunctive relief and sought notice of the third-party subpoenas. The court denied the requested relief, but the Court of Appeals reversed with respect to the District Court's denial of respondents' request for notice of subpoenas issued to third parties.

Held: The SEC is not required to notify the "targets" of nonpublic investigations into possible violations of the securities laws when the SEC issues subpoenas to third parties. The SEC has discretion to determine when such notice would be appropriate and when it would not. Pp. 741-751.

(a) Notice to "targets" is not required by any constitutional provision. When a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him, the Due Process Clause of the Fifth Amendment is not implicated because an administrative investigation adjudicates no legal rights, and the Confrontation Clause of the Sixth Amendment is not offended since it does not come into play until the initiation of criminal proceedings. Nor may a person inculpated by materials sought by a subpoena issued to a third party seek shelter in the Self-Incrimination Clause of the Fifth Amendment, since the subpoena does not "compel" anyone other than the person to whom it is directed to be a witness against himself. Finally, respondents cannot contend that notice of subpoenas issued to third parties is necessary to enable a "target" to prevent a search or seizure of his papers violative of the Fourth Amendment; when a person communicates information to a third party, even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. Pp. 742–743.

(b) The language and structure of the statutes administered by the SEC, particularly the Securities Act of 1933 and the Securities Exchange Act of 1934, do not support the imposition of a duty on the SEC to notify a "target" of an investigation when it issues a subpoena to a third party. The provisions vesting the SEC with the power to conduct investigations and to issue and seek enforcement of subpoenas are expansive, and no provision expressly obliges the SEC to notify "targets" when subpoenas are issued to third parties. Congress intended to vest the SEC with considerable discretion in determining when and how to investigate possible statutory violations, and there is no evidence that Congress expected the Commission to adopt any particular procedure for notifying "targets" when it sought information from third parties. The fact that Congress recently has imposed a carefully limited obligation on the SEC under the Right to Financial Privacy Act to notify bank customers of administrative subpoenas issued to banks reinforces the conclusion that Congress assumed that the SEC was not and would not be subject to a general obligation to notify "targets" whenever it issued administrative subpoenas. Pp. 743–747.

(c) Nor is a notice requirement justified on the ground, asserted by respondents, that a "target" has a substantive right to insist that administrative subpoenas issued to third parties meet the standards set forth in *United States* v. *Powell,* 379 U. S. 48, and that, to enable the "target" to enforce this right by intervening in SEC enforcement actions against the subpoena recipients or by restraining the recipients' voluntary compliance, the "target" must be notified of the subpoenas. Even assuming, *arguendo,* that a "target" has such substantive and procedural rights, pragmatic considerations counsel against reinforcing those rights with a notice requirement. Administration of a notice requirement would be highly burdensome for both the SEC and the courts, particularly with regard to identification of the persons and organizations that should be considered "targets" of investigations. Moreover, the imposition of a notice requirement would substantially increase the ability of "targets" who have something to hide to impede legitimate SEC investigations by discouraging subpoena recipients from complying, or by destroying or altering documents, intimidating witnesses, or transferring securities or funds so that they could not be reached by the Government. Pp. 747–751.

704 F. 2d 1065, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Samuel A. Alito, Jr., Daniel L. Goelzer, Paul Gonson, Linda D. Fienberg, Larry R. Lavoie, Harry J. Weiss,* and *Elizabeth A. Spurlock.*

William D. Symmes argued the cause for respondents. With him on the brief for respondents Magnuson et al. was *Thomas D. Cochran. C. Dean Little* and *D. William Toone* filed a brief for respondents Jerry T. O'Brien, Inc., et al.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Securities and Exchange Commission (SEC or Commission) has statutory authority to conduct nonpublic investigations into possible violations of the securities laws and, in the course thereof, to issue subpoenas to obtain relevant information. The question before us is whether the Commission must notify the "target" of such an investigation when it issues a subpoena to a third party.

I

This case represents one shard of a prolonged investigation by the SEC into the affairs of respondent Harry F. Magnuson and persons and firms with whom he has dealt. The investigation began in 1980, when the Commission's staff reported to the Commission that information in their possession tended to show that Magnuson and others had been trading in the stock of specified mining companies in a manner violative of the registration, reporting, and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. In response, the Commission issued a Formal

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**Michael P. Cox* filed a brief for the North American Securities Administrators Association, Inc., as *amicus curiae* urging reversal.

Ronald L. Olson filed a brief for Wedbush, Noble, Cooke, Inc., as *amicus curiae* urging affirmance.

Order of Investigation[1] authorizing employees of its Seattle Regional Office to initiate a "private investigation" into the transactions in question and, if necessary, to subpoena testimony and documents "deemed relevant or material to the inquiry." Complaint, Exhibit A, pp. 3–4.

Acting on that authority, members of the Commission staff subpoenaed financial records in the possession of respondent Jerry T. O'Brien, Inc. (O'Brien), a broker-dealer firm, and respondent Pennaluna & Co. (Pennaluna). O'Brien voluntarily complied, but Pennaluna refused to disgorge the requested materials. Soon thereafter, in response to several inquiries by O'Brien's counsel, a member of the SEC staff informed O'Brien that it was a "subject" of the investigation.

O'Brien, Pennaluna, and their respective owners[2] promptly filed a suit in the District Court for the Eastern District of Washington, seeking to enjoin the Commission's investigation and to prevent Magnuson from complying with subpoenas that had been issued to him.[3] Magnuson filed a cross-claim, also seeking to block portions of the investigation. O'Brien then filed motions seeking authority to depose the Commission's officers and to conduct expedited discovery into the Commission's files.[4]

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[1] A Formal Order of Investigation is issued by the Commission only after its staff has conducted a preliminary inquiry, in the course of which "no process is issued [nor] testimony compelled." 17 CFR § 202.5(a) (1983). The purposes of such an order seem to be to define the scope of the ensuing investigation and to establish limits within which the staff may resort to compulsory process. See H. R. Rep. No. 96–1321, pt. 1, p. 2 (1980).

[2] The relationships between O'Brien, Pennaluna, and their individual owners are not fully elucidated by the papers before us. Because, for the purposes of this litigation, the interests of all of these respondents are identical, hereinafter they will be referred to collectively as O'Brien, except when divergence in their treatment by the courts below requires that they be differentiated.

[3] The principal bases of O'Brien's suit were that the SEC's Formal Order of Investigation was defective, that the investigation did not have a valid purpose, that the Commission should have afforded the subjects of the investigation a chance to comment upon it, and that the issues around which the case revolved had been litigated and settled in another proceeding. Complaint 9–15.

The District Court denied respondents' discovery motions and soon thereafter dismissed their claims for injunctive relief. *Jerry T. O'Brien, Inc.* v. *SEC*, No. C-81-546 (ED Wash., Jan. 20, 1982). The principal ground for the court's decision was that respondents would have a full opportunity to assert their objections to the basis and scope of the SEC's investigation if and when the Commission instituted a subpoena enforcement action. The court did, however, rule that the Commission's outstanding subpoenas[5] met the requirements outlined in *United States* v. *Powell*, 379 U. S. 48 (1964), for determining whether an administrative summons is judicially enforceable. Specifically, the District Court held that the Commission had a legitimate purpose in issuing the subpoenas, that the requested information was relevant and was not already in the Commission's possession, and that the issuance of the subpoenas comported with pertinent procedural requirements.

Following the District Court's decision, the SEC issued several subpoenas to third parties. In response, Magnuson and O'Brien renewed their request to the District Court for injunctive relief, accompanying the request with a motion, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, for a stay pending appeal. For the first time, respondents expressly sought notice of the subpoenas issued by the Commission to third parties. Reasoning that respondents lacked standing to challenge voluntary compliance with subpoenas by third parties, and that, in any subsequent proceeding brought by the SEC, respondents could move to suppress evidence the Commission had obtained from third parties through abusive subpoenas, the District Court denied the requested relief. *Jerry T. O'Brien, Inc.* v. *SEC*, No. C–81–546 (ED Wash., Mar. 25, 1982).[6]

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[4] During the pendency of the suit, the Commission, at the District Court's request, refrained from seeking enforcement of its outstanding subpoenas.

[5] Because no subpoenas were then outstanding against Jerry T. O'Brien, Inc., or O'Brien in his personal capacity, the District Court declined to determine whether the Commission had complied with the *Powell* standards in demanding records from those respondents.

A panel of the Court of Appeals for the Ninth Circuit affirmed the District Court's denial of injunctive relief with regard to the subpoenas directed at respondents themselves, agreeing with the lower court that respondents had an adequate remedy at law for challenging those subpoenas.[7] 704 F. 2d 1065, 1066–1067 (1983). However, the Court of Appeals reversed the District Court's denial of respondents' request for notice of subpoenas issued to third parties. In the Court of Appeals' view, "targets" of SEC investigations "have a right to be investigated consistently with the *Powell* standards." *Id.*, at 1068. To enable targets to enforce this right, the court held that they must be notified of subpoenas issued to others. *Id.*, at 1069.

The Court of Appeals denied the Commission's request for rehearing and rejected its suggestion for rehearing en banc. 719 F. 2d 300 (1983). Judge Kennedy, joined by four other judges, dissented from the rejection, arguing that the panel decision was unprecedented and threatened the ability of the

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[6] The District Court granted respondents a brief stay to enable them to petition the Court of Appeals for a longer stay pending disposition of the appeal, but the Court of Appeals refused to enjoin the Commission from proceeding with its investigation. The SEC then filed various subpoena enforcement actions. The Commission has prevailed in at least one of those suits, *SEC* v. *Magnuson*, No. 82–1178–Z (Mass., Aug. 11, 1982) (enforcing subpoenas to Magnuson family members); another is still pending, see *SEC* v. *Magnuson, et al.*, No. C–82–282–RJM (ED Wash., filed Apr. 19, 1982). Cf. *Magnuson* v. *SEC*, No. 82–2042 (Idaho, July 27, 1982) (rejecting motion by Magnuson and his wife to quash subpoenas directed to a financial institution).

[7] Because respondents have not cross-petitioned, the validity of the Court of Appeals' ruling on the merits of respondents' claims for injunctive relief with regard to the subpoenas directed at themselves is not before us.

SEC and other agencies to conduct nonpublic investigations into possible violations of federal law. *Ibid.*

We granted certiorari because of the importance of the issue presented. 464 U. S. 1038 (1984). We now reverse.

II

Congress has vested the SEC with broad authority to conduct investigations into possible violations of the federal securities laws and to demand production of evidence relevant to such investigations. *E. g.*, 15 U. S. C. §§ 77s(b), 78u(a), (b).[8] Subpoenas issued by the Commission are not self-enforcing, and the recipients thereof are not subject to penalty for refusal to obey. But the Commission is authorized to bring suit in federal court to compel compliance with its process. *E. g.*, 15 U. S. C. §§ 77v(b), 78u(c).[9]

No provision in the complex of statutes governing the SEC's investigative power expressly obliges the Commission to notify the "target" of an investigation when it issues a subpoena to a third party. If such an obligation is to be imposed on the Commission, therefore, it must be derived from one of three sources: a constitutional provision; an understanding on the part of Congress, inferable from the structure of the securities laws, regarding how the SEC should conduct its inquiries; or the general standards governing judicial enforcement of administrative subpoenas enunciated in *United States* v. *Powell*, 379 U. S. 48 (1964), and its progeny. Examination of these three potential bases for the Court of Appeals' ruling leaves us unpersuaded that the notice requirement fashioned by that court is warranted.

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[8] The provisions cited in the text are the pertinent provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, respectively. In conducting the investigation that gives rise to this case, the Commission relied solely on those Acts. Many other statutes administered by the SEC contain similar provisions. See 15 U. S. C. § 79r (Public Utility Holding Company Act of 1935); 15 U. S. C. § 77uuu(a) (Trust Indenture Act of 1939); 15 U. S. C. §§ 80a–41(a), (b) (Investment Company Act of 1940); 15 U. S. C. §§ 80b–9(a), (b) (Investment Advisers Act of 1940).

[9] The analogous enforcement provisions for the other statutes administered by the Commission are: 15 U. S. C. § 79r(d) (Public Utility Holding Company Act of 1935); 15 U. S. C. § 77uuu(a) (incorporating by reference 15 U. S. C. § 77v(b)) (Trust Indenture Act of 1939); 15 U. S. C. § 80a–41(c) (Investment Company Act of 1940); 15 U. S. C. § 80b–9(c) (Investment Advisers Act of 1940).

A

Our prior cases foreclose any constitutional argument respondents might make in defense of the judgment below. The opinion of the Court in *Hannah* v. *Larche*, 363 U. S. 420 (1960), leaves no doubt that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights, *id.*, at 440–443, and the Confrontation Clause does not come into play until the initiation of criminal proceedings, *id.*, at 440, n. 16. These principles plainly cover an inquiry by the SEC into possible violations of the securities laws.

It is also settled that a person inculpated by materials sought by a subpoena issued to a third party cannot seek shelter in the Self-Incrimination Clause of the Fifth Amendment. The rationale of this doctrine is that the Constitution proscribes only *compelled* self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed,[10] the subpoena surely does not "compel" anyone else to be a witness against himself. *Fisher* v. *United States*, 425 U. S. 391, 397 (1976); *Couch* v. *United States*, 409 U. S. 322, 328–329 (1973). If the "target" of an investigation by the SEC has no Fifth Amendment right to challenge enforcement of a subpoena directed at a third party, he clearly can assert no derivative right to notice when the Commission issues such a subpoena.

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[10] Cf. *United States* v. *Doe*, 465 U. S. 605, 612–613 (1984).

Finally, respondents cannot invoke the Fourth Amendment in support of the Court of Appeals' decision. It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. *United States* v. *Miller*, 425 U. S. 435, 443 (1976). Relying on that principle, the Court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government from his bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas. *Id.*, at 443, and n. 5.[11] See also *Donaldson* v. *United States*, 400 U. S. 517, 522 (1971) (Internal Revenue summons directed to third party does not trench upon any interests protected by the Fourth Amendment).[12] These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers.

B

The language and structure of the statutes administered by the Commission afford respondents no greater aid. The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive. For example, § 19(b) of the Securities Act of 1933, 48 Stat. 85–86, empowers the SEC to conduct investigations "which, in the opinion of the Commission, are necessary and proper for the enforcement" of the Act and to "require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry." 15 U. S. C. § 77s(b). Similarly, §§ 21(a) and 21(b) of the Securities Exchange Act of 1934, 48 Stat. 899, 900, authorize the Commission to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter [or] the rules or regulations thereunder" and to demand to see any papers "the Commission deems relevant or material to the inquiry." 15 U. S. C. §§ 78u(a), (b).[13]

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[11] It should be noted that any Fourth Amendment claims that might be asserted by respondents are substantially weaker than those of the bank customer in *Miller* because respondents, unlike the customer, cannot argue that the subpoena recipients were required by law to keep the records in question. Cf. 425 U. S., at 455–456 (MARSHALL, J., dissenting).

[12] Cf. *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 414–415 (1984) (discussing the Fourth Amendment rights of the *recipient* of an administrative subpoena).

More generally, both statutes vest the SEC with "power to make such rules and regulations as may be necessary or appropriate to implement [their] provisions . . . ." 15 U. S. C. §§ 77s(a), 78w(a)(1). Relying on this authority, the SEC has promulgated a variety of rules governing its investigations, one of which provides that, "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 CFR § 203.5 (1983). In other words, the Commission has formally adopted the policy of not routinely informing anyone, including targets, of the existence and progress of its investigations.[14] To our knowledge, Congress has never questioned this exercise by the Commission of its statutory power. And, in another context, we have held that rulemaking authority comparable to that enjoyed by the SEC is broad enough to empower an agency to "establish standards for determining whether to conduct an investigation publicly or in private." *FCC* v. *Schreiber*, 381 U. S. 279, 292 (1965).

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[13] The other statutes administered by the SEC contain similarly broad delegations of investigatory power. See the provisions cited in n. 8, *supra*.

[14] In practice, virtually all investigations conducted by the Commission are nonpublic. See 3 L. Loss, Securities Regulation 1955 (2d ed. 1961); SEC, Report of the Advisory Committee on Enforcement Policies and Practices 18 (1972).

It appears, in short, that Congress intended to vest the SEC with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the Commission. We discern no evidence that Congress wished or expected that the Commission would adopt any particular procedures for notifying "targets" of investigations when it sought information from third parties.

The inference that the relief sought by respondents is not necessary to give effect to congressional intent is reinforced by the fact that, in one special context, Congress has imposed on the Commission an obligation to notify persons directly affected by its subpoenas. In 1978, in response to this Court's decision in *United States* v. *Miller*, *supra*,[15] Congress enacted the Right to Financial Privacy Act, 92 Stat. 3697, 12 U. S. C. § 3401 *et seq.* That statute accords customers of banks and similar financial institutions certain rights to be notified of and to challenge in court administrative subpoenas of financial records in the possession of the banks. The most salient feature of the Act is the narrow scope of the entitlements it creates. Thus, it carefully limits the kinds of customers to whom it applies, §§ 3401(4), (5), and the types of records they may seek to protect, § 3401(2). A customer's ability to challenge a subpoena is cabined by strict procedural requirements. For example, he must assert his claim within a short period of time, § 3410(a), and cannot appeal an adverse determination until the Government has completed its investigation, § 3410(d). Perhaps most importantly, the statute is drafted in a fashion that minimizes the risk that customers' objections to subpoenas will delay or frustrate agency investigations. Thus, a court presented with such a challenge is required to rule upon it within seven days of the Government's response, § 3410(b), and the pertinent statutes of limitations are tolled while the claim is pending, § 3419. Since 1980, the SEC has been subject to the constraints of the Right to Financial Privacy Act. Pub. L. 96–433, § 3, 94 Stat. 1855, 15 U. S. C. § 78u(h)(1). When it made the statute applicable to the SEC, however, Congress empowered the Commission in prescribed circumstances to seek *ex parte* orders authorizing it to delay notifying bank customers when it subpoenas information about them, thereby further curtailing the ability of persons under investigation to impede the agency's inquiries. 15 U. S. C. § 78u(h)(2).

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[15] See H. R. Rep. No. 95–1383, p. 34 (1978) (the purpose of the statute is to fill the gap left by the ruling in *Miller* that a bank customer has "no standing under the Constitution to contest Government access to financial records").

Considerable insight into the legislators' conception of the scope of the SEC's investigatory power can be gleaned from the foregoing developments. We know that Congress recently had occasion to consider the authority of the SEC and other agencies to issue and enforce administrative subpoenas without notifying the persons whose affairs may be exposed thereby. In response, Congress enacted a set of carefully tailored limitations on the agencies' power, designed "to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." H. R. Rep. No. 95–1383, p. 33 (1978). The manner in which Congress dealt with this problem teaches us two things. First, it seems apparent that Congress assumed that the SEC was not and would not be subject to a general obligation to notify "targets" of its investigations whenever it issued administrative subpoenas.[16] Second, the complexity and subtlety of the procedures embodied in the Right to Financial Privacy Act suggest that Congress would find troubling the crude and unqualified notification requirement ordered by the Court of Appeals.[17]

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[16] In this regard, it is noteworthy that the pertinent congressional Committees expressed their desire that the judiciary not supplement the remedies created by the statute with any implied causes of action. See H. R. Rep. No. 96–1321, pt. 1, p. 10 (1980); H. R. Rep. No. 95–1383, pp. 54, 56, 225, 230 (1978).

C

The last of the three potential footings for the remedy sought by respondents is some other entitlement that would be effectuated thereby. Respondents seek to derive such an entitlement from a combination of our prior decisions. Distilled, their argument is as follows: A subpoena issued by the SEC must comport with the standards set forth in our decision in *United States* v. *Powell*, 379 U. S., at 57–58.[18] Not

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[17] The significance of these two lessons is not that they illuminate Congress' intent when it enacted or when it subsequently amended the crucial provisions vesting the Commission with investigatory authority, see *supra*, at 743–744. Rather, they inform our determination whether adoption of the remedy proposed by respondents would comport with or disrupt the system of statutes governing the issuance and trading of securities, as that system has been modified and refined by Congress in the years since 1933. In this regard, our inquiry is analogous to the kind of analysis contemplated by the third of the four factors we consider when deciding whether it would be appropriate to create a private right of action as an adjunct to a right created by statute: "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . ?" See, *e. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 688, n. 9, 703–708 (1979); *Cort* v. *Ash*, 422 U. S. 66, 78 (1975).

[18] The holding of *Powell* was that the Commissioner of Internal Revenue need not demonstrate probable cause in order to secure judicial enforcement of a summons issued pursuant to § 7602 of the Internal Revenue Code. The Court then went on to sketch the requirements that the Commissioner would be obliged to satisfy:

"He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle only the recipient of an SEC subpoena, but also any person who would be affected by compliance therewith, has a substantive right, under *Powell*, to insist that those standards are met. A target of an SEC investigation may assert the foregoing right in two ways. First, relying on *Reisman* v. *Caplin*, 375 U. S. 440, 445 (1964), and *Donaldson* v. *United States*, 400 U. S., at 529,[19] the target may seek permissive intervention in an enforcement action brought by the Commission against the subpoena recipient. Second, if the recipient of the subpoena threatens voluntarily to turn over the requested information, the target "might restrain compliance" by the recipient, thereby forcing the Commission to institute an enforcement suit. See *Reisman* v. *Caplin*, *supra*, at 450. A target can avail himself of these options only if he is aware of the existence of subpoenas directed at others. To ensure that ignorance does not prevent a target from asserting his

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a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U. S., at 57–58 (footnote omitted).

See *United States* v. *LaSalle National Bank*, 437 U. S. 298, 313–314 (1978). Some lower courts have held or assumed that the SEC must satisfy these standards in order to obtain enforcement of its subpoenas. *E. g.*, *SEC* v. *ESM Government Securities, Inc.*, 645 F. 2d 310, 313–314 (CA5 1981). But cf. *In re EEOC*, 709 F. 2d 392, 398, n. 2 (CA5 1983). Respondents contend that the obligation of an agency to follow pertinent "administrative steps" means in this context that any subpoena issued under the auspices of the SEC must come within the purview of a Formal Order of Investigation, see n. 1, *supra*. Because of the manner in which we dispose of this case, we have no occasion to pass upon respondents' characterization or application of our decision in *Powell*.

[19] In *Reisman*, the Court indicated in dictum that "both parties summoned [under § 7602] and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims." 375 U. S., at 445; see *id.*, at 449. Our decision in *Donaldson* made clear that the right of a third party to intervene in an enforcement action "is permissive only and is not mandatory," 400 U. S., at 529, and that determination whether intervention should be granted in a particular case requires "[t]he usual process of balancing opposing equities," *id.*, at 530.

rights, respondents conclude, the Commission must notify him when it issues a subpoena to a third party.

There are several tenuous links in respondents' argument. Especially debatable are the proposition that a target has a substantive right to be investigated in a manner consistent with the *Powell* standards and the assertion that a target may obtain a restraining order preventing voluntary compliance by a third party with an administrative subpoena. Certainly we have never before expressly so held. For the present, however, we may assume, *arguendo,* that a target enjoys each of the substantive and procedural rights identified by respondents. Nevertheless, we conclude that it would be inappropriate to elaborate upon those entitlements by mandating notification of targets whenever the Commission issues subpoenas.

Two considerations underlie our decision on this issue. First, administration of the notice requirement advocated by respondents would be highly burdensome for both the Commission and the courts. The most obvious difficulty would involve identification of the persons and organizations that should be considered "targets" of investigations.[20] The SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law.[21] To notify all potential wrongdoers in such a situation of the issuance of each subpoena would be virtually impossible. The Commission would thus be obliged to determine the point at which enough evidence had been assembled to focus suspicion on a manage-able subset of the participants in the transaction, thereby lending them the status of "targets" and entitling them to notice of the outstanding subpoenas directed at others. The complexity of that task is apparent. Even in cases in which the Commission could identify with reasonable ease the principal targets of its inquiry, another problem would arise. In such circumstances, a person not considered a target by the Commission could contend that he deserved that status and therefore should be given notice of subpoenas issued to others. To assess a claim of this sort, a district court would be obliged to conduct some kind of hearing to determine the scope and thrust of the ongoing investigation.[22] Implementation of this new remedy would drain the resources of the judiciary as well as the Commission.[23]

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[20] Neither the pertinent statutes nor the Commission's regulations define the term "target," so either the Commission or the courts would be obliged at the outset to develop a working definition of the term.

[21] So, for example, the Commission is sometimes called upon to investigate unusually active trading in the stock of a company during the period immediately preceding a tender offer for that stock. In such a case, the Commission may have no idea which (if any) of the thousands of purchasers had improper access to inside information.

Second, the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the Commission. More seriously, the understanding of the progress of an SEC inquiry that would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government.[24] Especially in the context of securities regulation, where speed in locating and halting violations of the law is so important, we would be loathe to place such potent weapons in the hands of persons with a desire to keep the Commission at bay.

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[22] Cf. 704 F. 2d 1065, 1069 (CA9 1983) (case below) ("The target's right could be asserted . . . by other appropriate district court proceedings").

[23] This remedy would also have the effect of laying bare the state of the Commission's knowledge and intentions midway through investigations. For the reasons sketched below, such exposure could significantly hamper the Commission's efforts to police violations of the securities laws.

[24] See *PepsiCo* v. *SEC*, 563 F. Supp. 828, 832 (SDNY 1983) (To impose a notification requirement on the SEC "would necessarily permit all targets—and presumably all potential targets—effectively to monitor the course and conduct of agency investigations. Experience and common

We acknowledge that our ruling may have the effect in practice of preventing some persons under investigation by the SEC from asserting objections to subpoenas issued by the Commission to third parties for improper reasons. However, to accept respondents' proposal "would unwarrantedly cast doubt upon and stultify the [Commission's] every investigatory move," *Donaldson* v. *United States*, 400 U. S., at 531. Particularly in view of Congress' manifest disinclination to require the Commission to notify targets whenever it seeks information from others, see *supra*, at 746–747, we refuse so to curb the Commission's exercise of its statutory power.[25]

III

Nothing in this opinion should be construed to imply that it would be improper for the SEC to inform a target that it has issued a subpoena to someone else. But, for the reasons indicated above, we decline to curtail the Commission's discretion to determine when such notice would be appropriate and when it would not. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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sense should establish that such a power would be greatly abused . . ."); cf. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 239 (1978) (citing the risk that employers or unions would attempt to "coerce or intimidate employees and others who have given statements" as a reason for holding exempt from disclosure under the Freedom of Information Act statements made to the National Labor Relations Board).

[25] Cf. *United States* v. *Arthur Young & Co.*, 465 U. S. 805, 816 (1984) ("'[A]bsent unambiguous directions from Congress,'" the summons power conferred on the Internal Revenue Service by statute should not be restricted by the courts) (quoting *United States* v. *Bisceglia*, 420 U. S. 141, 150 (1975)).

COPPERWELD CORP. ET AL. *v.* INDEPENDENCE TUBE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82–1260. Argued December 5, 1983—Decided June 19, 1984

Petitioner Copperweld Corp. purchased petitioner Regal Tube Co., a manufacturer of steel tubing, from Lear Siegler, Inc., which had operated Regal as an unincorporated division, and which under the sale agreement was bound not to compete with Regal for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned subsidiary. Shortly before Copperweld acquired Regal, David Grohne, who previously had been an officer of Regal, became an officer of Lear Siegler, and, while continuing to work for Lear Siegler, formed respondent corporation to compete with Regal. Respondent then gave Yoder Co. a purchase order for a tubing mill, but Yoder voided the order when it received a letter from Copperweld warning that Copperweld would be greatly concerned if Grohne contemplated competing with Regal and promising to take the necessary steps to protect Copperweld's rights under the noncompetition agreement with Lear Siegler. Respondent then arranged to have a mill supplied by another company. Thereafter, respondent filed an action in Federal District Court against petitioners and Yoder. The jury found, *inter alia*, that petitioners had conspired to violate § 1 of the Sherman Act but that Yoder was not part of the conspiracy, and awarded treble damages against petitioners. The Court of Appeals affirmed. Noting that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy, the court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, but held that such liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible," and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

Held: Petitioner Copperweld and its wholly owned subsidiary, petitioner Regal, are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. Pp. 759–777.

(a) While this Court has previously seemed to acquiesce in the "intra-enterprise conspiracy" doctrine, which provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership, the Court has never explored or analyzed in detail the justifications for such a rule. Pp. 759–766.

(b) Section 1 of the Sherman Act, in contrast to § 2, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities, and does not reach conduct that is "wholly unilateral." Pp. 767–769.

(c) The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny. In reality, the parent and subsidiary *always* have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Here, nothing in the record indicates any meaningful difference between Regal's operations as an unincorporated division of Lear Siegler and its later operations as a wholly owned subsidiary of Copperweld. Pp. 771–774.

(d) The appropriate inquiry in this case is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects or whether the term "conspiracy" will bear a literal construction that includes a parent and its subsidiaries, but rather whether the logic underlying Congress' decision to exempt unilateral conduct from scrutiny under § 1 of the Sherman Act similarly excludes the conduct of a parent and subsidiary. It can only be concluded that the coordinated behavior of a parent and subsidiary falls outside the reach of § 1. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an "intra-enterprise conspiracy" doctrine. A corporation's initial acquisition of control is always subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, and thereafter the enterprise is subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act. Pp. 774–777.

691 F. 2d 310, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 778. WHITE, J., took no part in the consideration or decision of the case.

Erwin N. Griswold argued the cause for petitioners. With him on the briefs were *William R. Jentes, Sidney N. Herman, Robert E. Shapiro,* and *Donald I. Baker.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Assistant Attorney General Collins, Carolyn F. Corwin, Barry Grossman,* and *Nancy C. Garrison.*

Victor E. Grimm argued the cause for respondent. With him on the brief were *John R. Myers* and *Scott M. Mendel.**

**J. Randolf Wilson, Russell H. Carpenter, Jr., Stephen A. Bokat, Cynthia Wicker, William E. Blasier,* and *Quentin Riegel* filed a brief for the Chamber of Commerce of the United States et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Alabama et al. by *Robert K. Corbin,* Attorney General of Arizona, and *Richard A. Alcorn* and *Charles L. Eger,* Assistant Attorneys General; *Charles A. Graddick,* Attorney General of Alabama, and *Richard Owen,* Assistant Attorney General; *John Steven Clark,* Attorney General of Arkansas, and *Jeffrey A. Bell,* Assistant Attorney General; *Duane Woodard,* Attorney General of Colorado, and *Thomas P. McMahon,* Assistant Attorney General; *Neil F. Hartigan,* Attorney General of Illinois, and *Robert E. Davy,* Assistant Attorney General; *Thomas J. Miller,* Attorney General of Iowa, and *John R. Perkins,* Assistant Attorney General; *Robert T. Stephan,* Attorney General of Kansas, and *Wayne E. Hundley,* Deputy Attorney General; *Steven L. Beshear,* Attorney General of Kentucky, and *James M. Ringo,* Assistant Attorney General; *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Stephen P. Kilgriff,* Assistant Attorney General; *Bill Allain,* Attorney General of Mississippi, and *Robert Sanders,* Special Assistant Attorney General; *Mike Greely,* Attorney General of Montana, and *Joe R. Roberts,* Assistant Attorney General; *Paul L. Douglas,* Attorney General of Nebraska, and *Dale A. Comer,* Assistant Attorney General; *Robert O. Wefald,* Attorney General of North Dakota, and *Alan C. Hoberg,* Assistant Attorney General; *Michael C. Turpen,* Attor-

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under § 1 of the Sherman Act.

I

A

The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel

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ney General of Oklahoma, and *James B. Franks*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon; *John J. Easton, Jr.*, Attorney General of Vermont, and *Glenn R. Jarrett*, Assistant Attorney General; *Ken Eikenberry*, Attorney General of Washington, *John R. Ellis*, Deputy Attorney General, and *Jon P. Ferguson*, Assistant Attorney General; *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; *Joseph I. Lieberman*, Attorney General of Connecticut, and *Robert M. Langer*, Assistant Attorney General; *Charles M. Oberly*, Attorney General of Delaware, and *Vincent M. Amberly*, Deputy Attorney General; *James E. Tierney*, Attorney General of Maine, and *Stephen L. Wessler*, Senior Assistant Attorney General; *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II*, Assistant Attorney General; *Frank J. Kelley*, Attorney General of Michigan, and *Edwin M. Bladen*, Assistant Attorney General; *Paul Bardacke*, Attorney General of New Mexico; *Rufus L. Edmisten*, Attorney General of North Carolina, and *H. A. Cole, Jr.*, Special Deputy Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Faith A. LaSalle*, Special Assistant Attorney General; *Mark V. Meierhenry*, Attorney General of South Dakota, and *Dennis R. Holmes*, Deputy Attorney General; *William M. Leech, Jr.*, Attorney General of Tennessee, and *William J. Haynes, Jr.*, Deputy Attorney General; *David L. Wilkinson*, Attorney General of Utah, *Stephen G. Schwendiman*, Chief, Assistant Attorney General, and *Suzanne M. Dallimore*, Assistant Attorney General; *A. G. McClintock*, Attorney General of Wyoming, and *Gay Vanderpoel*, Senior Assistant Attorney General; *Inez Smith Reid*, Acting Corporation Council for the District of Columbia, and *Francis S. Smith*, Assistant Corporation Council.

Briefs of *amici curiae* were filed for the Canadian Manufacturers Association et al. by *John DeQ. Briggs III*, *Scott E. Flick*, and *Jan Schneider*; and for Kaiser Aluminum & Chemical Corporation by *Milton Handler* and *John A. Moore*.

tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C. E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

In 1972 petitioner Copperweld Corp. purchased the Regal division from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's noncompetition agreement would thwart the new competitor. Although their lawyer advised them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates entering the structural tube market . . . in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company.

B

In 1976 respondent filed this action in the District Court against petitioners and Yoder.[1] The jury found that

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[1] The chairman of the board and chief executive officer of both Copperweld and Regal, Phillip H. Smith, was also named as a defendant. In addition, respondents originally charged petitioners and Smith with an attempt to monopolize the market for structural steel tubing in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2. Before

Copperweld and Regal had conspired to violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, but that Yoder was not part of the conspiracy. It also found that Copperweld, but not Regal, had interfered with respondent's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with respondent's contractual relationship with a potential customer of respondent, Deere Plow & Planter Works, and had slandered respondent to Deere; and that Yoder had breached its contract to supply a tubing mill.

At a separate damages phase, the judge instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach should be identical and not double counted. The jury then awarded $2,499,009 against petitioners on the antitrust claim, which was trebled to $7,497,027. It awarded $15,000 against Regal alone on the contractual interference and slander counts pertaining to Deere. The court also awarded attorney's fees and costs after denying petitioners' motions for judgment n. o. v. and for a new trial.

C

The United States Court of Appeals for the Seventh Circuit affirmed. 691 F. 2d 310 (1982). It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorpo-

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trial respondent dismissed Smith as a defendant and dismissed its § 2 monopolization count.

Petitioners counterclaimed on the ground that respondent and Grohne had used proprietary information belonging to Regal, had competed unfairly by hiring away key Regal personnel, and had interfered with prospective business relationships by filing the lawsuit on the eve of a large Copperweld debenture offering. At the close of the evidence, the court directed a verdict against petitioners on their counterclaims. The disposition of these claims is not at issue before this Court.

rated division would escape liability for lack of the requisite two legal persons. However, relying on its decision in *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704 (1979), cert. denied, 445 U. S. 917 (1980), the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F. 2d, at 318. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses.[2] It also held that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, 462 U. S. 1131 (1983), and we reverse.

II

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy.[3] The so-called "intra-enterprise conspiracy" doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions.

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[2] The jury was instructed to consider many different factors: for instance, whether Copperweld and Regal had separate management staffs, separate corporate officers, separate clients, separate records and bank accounts, separate corporate offices, autonomy in setting policy, and so on. The jury also was instructed to consider "any other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies." App. to Pet. for Cert. B–9.

[3] Section 1 of the Sherman Act provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U. S. C. § 1.

In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The problem began with *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). The controlling shareholder of the Checker Cab Manufacturing Corp., Morris Markin, also controlled numerous companies operating taxicabs in four cities. With few exceptions, the operating companies had once been independent and had come under Markin's control by acquisition or merger. The complaint alleged conspiracies under §§1 and 2 of the Sherman Act among Markin, Checker, and five corporations in the operating system. The Court stated that even restraints in a vertically integrated enterprise were not "necessarily" outside of the Sherman Act, observing that an unreasonable restraint

> "*may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.* Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. *The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.* See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360–361, 376–377.
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> "*And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.* The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object

> of the combination. The theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion . . . but by deliberate, calculated purchase for control.'" *Id.*, at 227–228 (emphasis added) (quoting *United States* v. *Reading Co.*, 253 U. S. 26, 57 (1920)).

It is the underscored language that later breathed life into the intra-enterprise conspiracy doctrine. The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.[4] The *Yellow Cab* passage is most fairly read in light of this settled rule. In *Yellow Cab*, the affiliation of the defendants was irrelevant because the original acquisitions were *themselves* illegal.[5] An affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a "'deliberate, calculated' " manner. Other language in the opinion is to the same effect.[6]

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[4] Under the arrangements condemned in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 354 (1904) (plurality opinion), "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911), and *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911), the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be viewed as the conspiracy, *id.*, at 184, the Court left no doubt that "the combination in and of itself" was a restraint of trade and a monopolization, *id.*, at 187.

[5] Contrary to the dissent's suggestion, *post*, at 779, 788, n. 18, our point is not that *Yellow Cab* found only the initial acquisition illegal; our point is that the illegality of the initial acquisition was a predicate for its holding that any postacquisition conduct violated the Act.

The Court's opinion relies on *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933); however, examination of that case reveals that it gives very little support for the broad doctrine *Yellow Cab* has been thought to announce. On the contrary, the language of Chief Justice Hughes speaking for the Court in *Appalachian Coals* supports a contrary conclusion. After observing that "[t]he restrictions the Act imposes are not mechanical or artificial," 288 U. S., at 360, he went on to state:

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[6] When discussing the fact that some of the affiliated Chicago operating companies did not compete to obtain exclusive transportation contracts held by another of the affiliated companies, the Court stated:

"[T]he fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, *the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.*" 332 U. S., at 229 (emphasis added).

The passage quoted in text is soon followed by a cite to *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189 (1944). *Crescent Amusement* found violations of §§ 1 and 2 by film exhibitors affiliated (in most cases) by 50 percent ownership. The exhibitors used the monopoly power they possessed in certain towns to force film distributors to give them favorable terms in other towns. The Court found it unnecessary to view the distributors as part of the conspiracy, *id.*, at 183, so the Court plainly viewed the affiliated entities themselves as the conspirators. The *Crescent Amusement* Court, however, in affirming an order of divestiture, noted that such a remedy was appropriate when "creation of the combination is itself the violation." *Id.*, at 189. This suggests that both *Crescent Amusement* and *Yellow Cab*, which cited the very page on which this passage appears, stand for a narrow rule based on the original illegality of the affiliation.

The dissent misconstrues a later passage in *Crescent Amusement* stating that divestiture need not be limited to those affiliates whose "acquisition was part of the fruits of the conspiracy," 323 U. S., at 189. See *post*, at 780–781. This meant only that divestiture could apply to affiliates other than those who were driven out of business by the practices of the original conspirators and who were then acquired illegally to increase the combination's monopoly power. See 323 U. S., at 181. It did not mean that affiliates acquired for lawful purposes were subject to divestiture.

> "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance." *Id.*, at 377.[7]

As we shall see, *infra*, at 771–774, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

The ambiguity of the *Yellow Cab* holding yielded the one case giving support to the intra-enterprise conspiracy doctrine.[8] In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), the Court held that two wholly owned subsidiaries of a liquor distiller were guilty under § 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme. The Court offhandedly dismissed the defendants' argument that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." *Id.*, at 215. With only a citation to *Yellow Cab* and no further analysis, the Court stated that the

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[7] *Appalachian Coals* does state that the key question is whether there is an unreasonable restraint of trade or an attempt to monopolize. "If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration." 288 U. S., at 377. *Appalachian Coals*, however, validated a cooperative selling arrangement among independent entities. The statement that intracorporate relationships would be subject to liability under § 1 is thus dictum. The statement may also envision merely the limited rule in *Yellow Cab* pertaining to acquisitions that are themselves anticompetitive.

[8] In two cases decided soon after *Yellow Cab* on facts similar to *Crescent Amusement*, see n. 6, *supra*, affiliated film exhibitors were found to have conspired in violation of § 1. *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948); *United States* v. *Griffith*, 334 U. S. 100 (1948). *Griffith* simply assumed that the companies were capable of conspiring with each other; *Schine* cited *Yellow Cab* and *Crescent Amusement* for the proposition, 334 U. S., at 116. In both cases, however, an intra-enterprise conspiracy holding was unnecessary not only because the Court found a § 2 violation, but also because the affiliated exhibitors had conspired with independent film distributors. See *ibid.*; *Griffith*, *supra*, at 103, n. 6, 109.

> "suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws"

and stated that this rule was "especially applicable" when defendants "hold themselves out as competitors." 340 U. S., at 215.

Unlike the *Yellow Cab* passage, this language does not pertain to corporations whose initial affiliation was itself unlawful. In straying beyond *Yellow Cab*, the *Kiefer-Stewart* Court failed to confront the anomalies an intra-enterprise doctrine entails. It is relevant nonetheless that, were the case decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff.[9] An intra-enterprise conspiracy doctrine thus would no longer be necessary to a finding of liability on the facts of *Kiefer-Stewart*.

Later cases invoking the intra-enterprise conspiracy doctrine do little more than cite *Yellow Cab* or *Kiefer-Stewart*, and in none of the cases was the doctrine necessary to the result reached. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951), involved restrictive horizontal agreements between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests respectively. The *Timken* Court cited *Kiefer-Stewart* to show that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." 341 U. S., at 598. But the relevance of this statement is unclear. The American defendant in *Timken* did not own a majority interest in either of the foreign corporate conspirators and, as the District Court found, it did not control them.[10] Moreover, as in *Yellow Cab*, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices.[11] The Court's reliance on the intra-enterprise conspiracy doctrine was in no way necessary to the result.

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[9] Although the plaintiff apparently never acquiesced in the resale price maintenance scheme, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 182 F. 2d 228, 231 (CA7 1950), rev'd, 340 U. S. 211 (1951), one of the subsidiaries did gain the compliance of other wholesalers after once terminating them for refusing to abide by the pricing scheme. See 182 F. 2d, at 231; 340 U. S., at 213. A theory of combination between the subsidiaries and the wholesalers could now support § 1 relief, whether or not it could have when *Kiefer-Stewart* was decided. See *Albrecht* v. *Herald Co.*, 390 U. S. 145, 149–150, and n. 6 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960).

The same is true of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), which involved a conspiracy among a parent corporation and three subsidiaries to impose various illegal restrictions on plaintiff franchisees. The Court did suggest that, because the defendants

> "availed themselves of the privilege of doing business through separate corporations, the fact of common own-

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[10] See *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 311–312 (ND Ohio 1949), aff'd as modified, 341 U. S. 593 (1951). The agreement of an individual named Dewar, who owned 24 and 50 percent of the foreign corporations respectively, was apparently required for the American defendant to have its way.

[11] For almost 20 years before they became affiliated by stock ownership, two of the corporations had been party to the sort of restrictive agreements the *Timken* Court condemned. Three Justices upholding antitrust liability were of the view that Timken's "interests in the [foreign] companies were obtained as part of a plan to promote the illegal trade restraints" and that the "intercorporate relationship" was "the core of the conspiracy." *Id.*, at 600–601. Because two Justices found no antitrust violation at all, see *id.*, at 605 (Frankfurter, J., dissenting); *id.*, at 606 (Jackson, J., dissenting), and two Justices did not take part, apparently only Chief Justice Vinson and Justice Reed were prepared to hold that there was a violation even if the initial acquisition itself was not illegal. See *id.*, at 601–602 (Reed, J., joined by Vinson, C. J., concurring).

> ership could not save them from any of the obligations that the law imposes on separate entities [citing *Yellow Cab* and *Timken*]." *Id.*, at 141–142.

But the Court noted immediately thereafter that "[i]n any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise dealers. *Ibid.* Thus, for the same reason that a finding of liability in *Kiefer-Stewart* could today be justified without reference to the intra-enterprise conspiracy doctrine, see n. 9, *supra*, the doctrine was at most only an alternative holding in *Perma Life Mufflers*.

In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

III

Petitioners, joined by the United States as *amicus curiae*, urge us to repudiate the intra-enterprise conspiracy doctrine.[12] The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise.

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[12] The doctrine has long been criticized. See, *e. g.*, Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev. 451 (1983); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981); Kempf, Bathtub Conspiracies: Has *Seagram* Distilled a More Potent Brew?, 24 Bus. Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183 (1955); Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section Rep. 20 (1956); Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss. L. J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20 (1968); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977).

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

A

The Sherman Act contains a "basic distinction between concerted and independent action." *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.[13] It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.[14] In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

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[13] Section 2 of the Sherman Act provides in pertinent part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U. S. C. § 2.

By making a conspiracy to monopolize unlawful, § 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under § 2 and not under § 1. Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1.

[14] For example, the Court has declared that § 2 does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571 (1966). We have also made clear that the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp.* v. *Pueblo*

Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." *Albrecht* v. *Herald Co.*, 390 U. S. 145, 149 (1968); accord, *Monsanto Co.* v. *Spray-Rite Corp.*, *supra*, at 761. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. See, *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918). Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive

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Bowl-O-Mat, Inc., 429 U. S. 477, 488 (1977) (damages for violation of Clayton Act § 7) (quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962)).

risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

B

The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.[15]

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[15] See, *e. g., Schwimmer* v. *Sony Corp. of America*, 677 F. 2d 946, 953 (CA2), cert. denied, 459 U. S. 1007 (1982); *Tose* v. *First Pennsylvania Bank, N. A.*, 648 F. 2d 879, 893–894 (CA3), cert. denied, 454 U. S. 893 (1981); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F. 2d 910, 916–917 (CA8 1976); *Greenville Publishing Co.* v. *Daily Reflec-*

There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.[16] Although this Court has not previously addressed the question,[17] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation

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tor, Inc., 496 F. 2d 391, 399 (CA4 1974) (dictum); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F. 2d 635, 643, n. 9 (CA9 1969); *Poller* v. *Columbia Broadcasting System, Inc.*, 109 U. S. App. D. C. 170, 174, 284 F. 2d 599, 603 (1960), rev'd on other grounds, 368 U. S. 464 (1962); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911, 914 (CA5 1952), cert. denied, 345 U. S. 925 (1953). Accord, Report of the Attorney General's National Committee to Study the Antitrust Laws 31 (1955). At the same time, many courts have created an exception for corporate officers acting on their own behalf. See, *e. g.*, *H & B Equipment Co.* v. *International Harvester Co.*, 577 F. 2d 239, 244 (CA5 1978) (dictum); *Greenville Publishing*, *supra; Johnston* v. *Baker*, 445 F. 2d 424, 427 (CA3 1971).

Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. 15 U. S. C. § 7. But § 1 does not declare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared to be illegal." As we note, the principles governing § 1 liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

[16] See 691 F. 2d 310, 316 (CA7 1982) (decision below); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 205–206 (CA5 1969); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 83–84 (CA9 1969), cert. denied, 396 U. S. 1062 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 109 U. S. App. D. C., at 174, 284 F. 2d, at 603.

[17] The Court left this issue unresolved in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S., at 469, n. 4.

and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

C

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946). But in reality a parent and a wholly owned subsidiary *always* have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.[18]

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.[19] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests.[20] Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29 (1962).[21]

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[18] As applied to a wholly owned subsidiary, the so-called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct. Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, *supra;* see generally *Ogilvie* v. *Fotomat Corp.*, 641 F. 2d 581 (CA8 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F. 2d 614 (CA9 1979), cert. denied, 447 U. S. 906 (1980); *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704 (CA7 1979), cert. denied, 445 U. S. 917 (1980). These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

[19] Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 141 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).[22] Such an incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

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[20] For example, "[s]eparate incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profit-sharing plans or different accounting practices." Areeda, 97 Harv. L. Rev., at 453.

[21] *Sunkist Growers* provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a § 1 or § 2 conspiracy among them because they were "one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities." 370 U. S., at 29. Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of *Sunkist Growers* supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1.

[22] See *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (CA9 1969), cert. denied, 396 U. S. 1062 (1970).

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[r]ealities must dominate the judgment." *Appalachian Coals, Inc.* v. *United States*, 288 U. S., at 360.[23]

D

Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See *post*, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

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[23] The dissent argues that references in the legislative history to "trusts" suggest that Congress intended § 1 to govern the conduct of all affiliated corporations. See *post*, at 787–788. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

"It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 21 Cong. Rec. 2457 (1890).

We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See *supra*, at 767–769. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.[24] Indeed, this Court has recognized that § 1 is limited to concerted conduct at least since the days of *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919). Accord, *post*, at 789.

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[24] Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with § 1 is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition. See *post*, at 784–787. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as 42 U. S. C. § 1985(3). Compare, *e. g.*, *Novotny* v. *Great Am. Fed. Sav. & Loan Assn.*, 584 F. 2d 1235 (CA3 1978) (en banc), vacated and remanded on other grounds, 442 U. S. 366 (1979), with *Dombrowski* v. *Dowling*, 459 F. 2d 190 (CA7 1972). And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as

The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, *supra*. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open

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conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L. J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv. L. Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a § 1 conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under § 1.[25] Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

IV

We hold that Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

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[25] "[T]he [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as *Amicus Curiae* 26, n. 42.

JUSTICE WHITE took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It is safe to assume that corporate affiliates do not vigorously compete with one another. A price-fixing or market-allocation agreement between two or more such corporate entities does not, therefore, eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a "contract," a "conspiracy," or merely a policy decision, because it surely does not unreasonably restrain competition within the meaning of the Sherman Act. The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of § 1.

Today the Court announces a new *per se* rule: a wholly owned subsidiary is incapable of conspiring with its parent under § 1 of the Sherman Act. Instead of redefining the word "conspiracy," the Court would be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary—the type of arrangement the Court is properly concerned with protecting—are not prohibited by § 1. Thus, the Court's desire to shield such arrangements from antitrust liability provides no justification for the Court's new rule.

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market. The jury apparently concluded that the two defendant corporations—

Copperweld and its subsidiary Regal—had successfully delayed Independence's entry into the steel tubing business by applying a form of economic coercion to potential suppliers of financing and capital equipment, as well as to potential customers. Everyone seems to agree that this conduct was tortious as a matter of state law. This type of exclusionary conduct is plainly distinguishable from vertical integration designed to achieve competitive efficiencies. If, as seems to be the case, the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under § 1 of the Sherman Act.

I

Repudiation of prior cases is not a step that should be taken lightly. As the Court wrote only days ago: "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, *ante*, at 212. It is therefore appropriate to begin with an examination of the precedents.

In *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), the Court explicitly stated that a corporate subsidiary could conspire with its parent:

> "The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Id.*, at 227.

The majority attempts to explain *Yellow Cab* by suggesting that it dealt only with unlawful acquisition of subsidiaries. *Ante*, at 761–762. But the Court mentioned acquisitions only as an additional consideration separate from the passage quoted above,[1] and more important, the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it *already* owned in themselves violated § 1.[2]

At least three cases involving the motion picture industry also recognize that affiliated corporations may combine or conspire within the meaning of § 1. In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), as the Court recognizes, *ante*, at 762, n. 6, the only conspirators were affiliated corporations. The majority's claim that the case involved only unlawful acquisitions because of the Court's comments concerning divestiture of the affiliates cannot be squared with the passage immediately following that cited by the majority, which states that there had been unlawful conduct going beyond the acquisition of subsidiaries:

> "That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. *But the relief need not, and under these facts should not, be so restricted* [to divestiture]. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues,

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[1] The language I have quoted, most of which is overlooked by the majority, makes it clear that the Court's adoption of the concept of conspiracy between affiliated corporations was unqualified. As the first word of the sentence indicates, the Court's following statement: "Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed," 332 U. S., at 227, expresses a separate if related point.

[2] "[B]y preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce." *Id.*, at 226–227 (footnote omitted).

there will be tempting opportunity for these exhibitors to continue to act in combination against the independents." 323 U. S., at 189–190 (emphasis supplied).

Similarly, in *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948), the Court held that concerted action by parents and subsidiaries constituted an unlawful conspiracy.[3] That was also the holding in *United States* v. *Griffith*, 334 U. S. 100, 109 (1948). The majority's observation that in these cases there were alternative grounds that could have been used to reach the same result, *ante*, at 763, n. 8, disguises neither the fact that the holding that actually appears in these opinions rests on conspiracy between affiliated entities, nor that today's holding is inconsistent with what was actually held in these cases.

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), the Court's holding was plain and unequivocal:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E. g. United States* v. *Yellow Cab Co.*, 332 U. S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Id.*, at 215.

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[3] "[T]he combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of § 1 and § 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173." 334 U. S., at 116.

This holding is so clear that even the Court, which is not wanting for inventiveness in its reading of the prior cases, cannot explain it away. The Court suggests only that today *Kiefer-Stewart* might be decided on alternative grounds, *ante*, at 764, ignoring the fact that today's holding is inconsistent with the ground on which the case actually was decided.[4]

A construction of the statute that reaches agreements between corporate parents and subsidiaries was again embraced by the Court in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951),[5] and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968).[6] The majority only notes that there might have been other grounds for decision available in these cases, *ante*, at 764–766, but again it cannot deny that its new rule is inconsistent with what the Court actually did write in these cases.

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[4] In *Kiefer-Stewart*, Seagram unsuccessfully argued that *Yellow Cab* was confined to cases concerning unlawful acquisitions, see Brief for Respondents, O. T. 1950, No. 297, p. 21. Thus the *Kiefer-Stewart* Court considered and rejected exactly the same argument embraced by today's majority.

[5] "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. *E. g.*, *Kiefer-Stewart Co.* v. *Seagram & Sons*, [340 U. S.,] at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." 341 U. S., at 598.

[6] "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See *Timken Co.* v. *United States*, 341 U. S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227 (1947)." 392 U. S., at 141–142.

Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions.[7] Perhaps most illuminating is the fact that until today, whether they favored the doctrine or not, it had been the universal conclusion of both the lower courts[8] and the commentators[9] that this Court's cases establish that a parent and a wholly owned subsidiary corporation are capable of conspiring in violation of § 1. In this very case the Court of Appeals observed:

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[7] Also pertinent is *United States* v. *Citizens & Southern National Bank*, 422 U. S. 86 (1975), in which the Court wrote:

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.' *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 215; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 141–142." *Id.*, at 116–117.

[8] See, *e. g.*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1054 (CA9), cert. denied, 459 U. S. 825 (1982); *Ogilvie* v. *Fotomat Corp.*, 641 F. 2d 581, 587–588 (CA8 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F. 2d 614, 617–618 (CA9 1979), cert. denied, 447 U. S. 906 (1980); *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704, 726 (CA7 1979), cert. denied, 445 U. S. 917 (1980); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F. 2d 20, 33–35, and n. 49 (CA3), cert. denied, 439 U. S. 876 (1978); *H & B Equipment Co.* v. *International Harvester Co.*, 577 F. 2d 239, 244–245 (CA5 1978); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 557 (CA1 1974), cert. denied, 421 U. S. 1004 (1975).

[9] See, *e. g.*, Report of the Attorney General's National Committee to Study the Antitrust Laws 30–36 (1955) (hereinafter cited as Attorney General's Committee Report); L. Sullivan, Law of Antitrust § 114 (1977); Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev. 451 (1983); Handler, Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review, 57 Calif. L. Rev. 182, 182–193 (1969); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, 26–61 (1981); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 188–212 (1955); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20, 22–24 (1968); Comment,

> "[T]he salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored. It is no accident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the same capacity to conspire, whether or not they can be found to have done so in a particular case." 691 F. 2d 310, 317 (CA7 1982) (footnotes omitted).

Thus, we are not writing on a clean slate. "[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977).[10] There can be no doubt that the Court today changes what has been taken to be the long-settled rule: a rule that Congress did not revise at any point in the last four decades. At a minimum there should be a strong presumption against the approach taken today by the Court. It is to the merits of that approach that I now turn.

II

The language of § 1 of the Sherman Act is sweeping in its breadth: "Every contract, combination in the form of trust or

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Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach, 71 Calif. L. Rev. 1732, 1739–1745 (1983) (hereinafter cited as Comment, Decisionmaking); Comment, All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14 Duquesne L. Rev. 63 (1975); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 718–727 (1977) (hereinafter cited as Note, Suggested Standard).

[10] See also *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U. S. 752, 769 (1984) (BRENNAN, J., concurring).

otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." 15 U. S. C. § 1. This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination:

> "[I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–60 (1911).

This broad construction is illustrated by the Court's refusal to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to satisfy the statutory language.[11]

Since the statute was written against the background of the common law,[12] reference to the common law is particularly enlightening in construing the statutory requirement of a "contract, combination in the form of trust or otherwise, or conspiracy." Under the common law, the question whether affiliated corporations constitute a plurality of actors within the meaning of the statute is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded.[13] The Congress that passed the Sherman Act was well acquainted with this rule. See 21 Cong. Rec. 2571 (1890) (remarks of Sen. Teller) ("Each corporation is a creature by itself"). Thus it has long been the law of criminal conspiracy that the officers of even a single corporation are capable of conspiring with each other or the corporation.[14] This Court has held that a corporation can conspire with its employee,[15] and that a labor union can "combine" with its business agent within the meaning of § 1.[16] This concept explains the *Timken* Court's statement that the affiliated corporations in that case made

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[11] See *Albrecht* v. *Herald Co.*, 390 U. S. 145, 149 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). See also *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U. S., at 764, n. 9.

[12] *E. g., Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 531–532 (1983); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978); *Standard Oil*, 221 U. S., at 59.

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[13] See, *e. g., Schenley Corp.* v. *United States*, 326 U. S. 432, 437 (1946) *(per curiam); New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440–442 (1934); *Burnet* v. *Clark*, 287 U. S. 410 (1932); *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558–559 (1844); *Bank of the United States* v. *Deveaux*, 5 Cranch 61 (1809).

[14] Attorney General's Committee Report, *supra* n. 9, at 30–31 (citing *Barron* v. *United States*, 5 F. 2d 799 (CA1 1925); *Mininsohn* v. *United States*, 101 F. 2d 477 (CA3 1939); *Egan* v. *United States*, 137 F. 2d 369 (CA8), cert. denied, 320 U. S. 788 (1943)). See also, *e. g., United States* v. *Hartley*, 678 F. 2d 961, 971–972 (CA11 1982), cert. denied, 459 U. S. 1170 (1983); *Alamo Fence Co. of Houston* v. *United States*, 240 F. 2d 179 (CA5 1957); *Patterson* v. *United States*, 222 F. 599, 618–619 (CA6), cert. denied, 238 U. S. 635 (1915); *Union Pacific Coal Co.* v. *United States*, 173 F. 737 (CA8 1909); *United States* v. *Consolidated Coal Co.*, 424 F. Supp. 577, 579–581 (SD Ohio 1976); *United States* v. *Griffin*, 401 F. Supp. 1222, 1224–1225 (SD Ind. 1975), aff'd mem. *sub nom. United States* v. *Metro Management Corp.*, 541 F. 2d 284 (CA7 1976); *United States* v. *Bridell*, 180 F. Supp. 268, 273 (ND Ill. 1960); *United States* v. *Kemmel*, 160 F. Supp. 718 (MD Pa. 1958); Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L. J. 1155, 1191–1199 (1982).

[15] See *Hyde* v. *United States*, 225 U. S. 347, 367–368 (1912). See also *United States* v. *Sampson*, 371 U. S. 75 (1962); *Fong Foo* v. *United States*, 369 U. S. 141 (1962) *(per curiam); Lott* v. *United States*, 367 U. S. 421 (1961); *Nye & Nissen* v. *United States*, 336 U. S. 613 (1949).

[16] See *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465 (1921).

"agreements between legally separate persons," 341 U. S., at 598. Thus, today's holding that agreements between parent and subsidiary corporations involve merely unilateral conduct is at odds with the way that this Court has traditionally understood the concept of a combination or conspiracy, and also at odds with the way in which the Congress that enacted the Sherman Act surely understood it.

Holding that affiliated corporations cannot constitute a plurality of actors is also inconsistent with the objectives of the Sherman Act. Congress was particularly concerned with "trusts," hence it named them in § 1 as a specific form of "combination" at which the statute was directed. Yet "trusts" consisted of affiliated corporations. As Senator Sherman explained:

> "Because these combinations are always in many States and, as the Senator from Missouri says, it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination is always of two or more, and in one case of forty-odd corporations, all bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." 21 Cong. Rec. 2569 (1890).

The activities of these "combinations" of affiliated corporations were of special concern:

> "[A]ssociated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.

> "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. . . . It is this kind of a combination we have to deal with now." *Id.*, at 2457.[17]

Thus, the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed.[18] The anomaly in today's holding is that the corporate devices most similar to the original "trusts" are now those which free an enterprise from antitrust scrutiny.

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[17] See also 21 Cong. Rec. 2562 (1890) (remarks of Sen. Teller); *id.*, at 2570 (remarks of Sen. Sherman); *id.*, at 2609 (remarks of Sen. Morgan).

[18] This legislative history thus demonstrates the error in the majority's conclusion that only acquisitions of corporate affiliates fall within § 1. See *ante*, at 761–762. The conduct of the trusts that Senator Sherman and others objected to went much further than mere acquisitions. Indeed, the irony of the Court's approach is that, had it been adopted in 1890, it would have meant that § 1 would have no application to trust combinations which had already been formed—the very trusts to which Senator Sherman was referring.

I cannot believe that the Court really intends to express doubt as to whether the Congress that passed the Sherman Act thought conspiracy doctrine could apply to corporations. *Ante*, at 775–776, n. 24. If that were not the case, then the Sherman Act would have no application to corporations. Since, as is clear and as the Court concedes, the Sherman Act does apply to corporations, there can be no doubt that Congress intended to apply the law of conspiracy to agreements between corporations.

III

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance—while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy § 1. *Ante*, at 771–774. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often is procompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of § 1. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), § 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.[19] From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market power through an agreement not to compete.[20] Unilateral conduct by a firm with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power,[21] and probably more, since the unilateral actor avoids the policing problems faced by cartels.

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[19] Market power is the ability to raise prices above those that would be charged in a competitive market. See *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U. S. 2, 27, n. 46 (1984); *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 620 (1977); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956).

The rule of *Yellow Cab* thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolists within the ambit of § 2 of the Act.[22] The doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for § 1 inquiry.[23] Finally, it must be remembered that not all persons who restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases § 1 can be applied to separately incorporated businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise.[24]

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[20] Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Ante*, at 769. That is true, but it is also true of any ordinary commercial contract between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts—both satisfy the multiplicity-of-actors requirement—and yet one of the most fundamental points in antitrust jurisprudence, dating at least to *Standard Oil*, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable—all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that § 1 is implicated. The Court's evidentiary concern lacks merit.

[21] We made this point in the context of resale price maintenance in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960):

"The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of a manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.*, at 44 (quoting *Colgate*, 250 U. S., at 307).

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[22] "[I]t is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate Section 1, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a 'dangerous probability' of monopoly had been reached, the requirement under Section 2 'attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity—setting a price, deciding what market it would deal in, or the like—which did not threaten competitive conditions." L. Sullivan, *supra* n. 9, § 114, at 324 (footnotes omitted).

[23] This was the case in *Kiefer-Stewart*, for example. Seagram had refused to sell liquor to Kiefer-Stewart unless it agreed to an illegal resale price maintenance scheme. Kiefer-Stewart refused to agree, and as a result was injured by losing access to Seagram's products. See 340 U. S., at 213.

[24] See *United States* v. *Turkette*, 452 U. S. 576, 588–593 (1981) (discussing congressional findings underlying the Organized Crime Control Act of 1970). Section 1 of the Sherman Act has on occasion been used against

The rule of *Yellow Cab* and its progeny is not one that condemns every parent-subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself.[25] Functional integration by its very nature requires unified action; hence in itself it has never been sufficient to establish the existence of an unreasonable restraint of trade: "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522 (1948). Restraints that act only on the parent or its subsidiary as a consequence of an otherwise lawful integration do not violate § 1 of the Sherman Act.[26] But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and

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various types of racketeering activity. See Hartwell, Criminal RICO and Antitrust, 52 Antitrust L. J. 311, 312–313 (1983); McLaren, Antitrust and Competition—Review of the Past Year and Suggestions for the Future, in New York State Bar Assn., 1971 Antitrust Law Symposium 1, 3 (1971).

[25] See Comment, Decisionmaking, *supra* n. 9, at 1753–1757; Note, Suggested Standard, *supra* n. 9, at 735–738. Professor Sullivan elaborates:

"Picture, at one end of the spectrum, a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. The fact that each store is operated by a separate corporation should not convert a family business into a cartel . . . . If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself. Hence it cannot restrain price competition with itself, or divide markets with itself, or act as a common purchasing agent for itself or otherwise restrain competition with itself, regardless of how many separate corporations the single firm may, for reasons unrelated to the act, be divided into." L. Sullivan, *supra* n. 9, § 114, at 326–327.

[26] Thus, the Court is wrong to suggest, *ante*, at 771–772, 774–776, and n. 24, that *Yellow Cab* could reach truly unilateral conduct involving only the employees of a single firm.

imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade."[27]

For example, in *Yellow Cab* the Court read the complaint as alleging that integration had assisted the parent in excluding competing manufacturers from the marketplace, 332 U. S., at 226–227, leading the Court to conclude that "restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination." *Id.*, at 227. Similarly, in *Crescent Amusement* the Court noted that corporate affiliation between exhibitors enhanced their buying power and "was one of the instruments in . . . making the conspiracy effective" in excluding independents from the market. 323 U. S., at 189–190. Thus, in both cases the Court found that the affiliation enhanced the ability of the parent corporation to exclude the competition of third parties, and hence raised entry barriers faced by actual and potential competitors. When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration.[28] In these cases, the affiliation assisted exclusionary conduct; it was not the competitive equivalent of unilateral integration but instead generated power to restrain marketwide competition.

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[27] If the rule of *Yellow Cab* and its progeny could be easily circumvented through, for example, use of unincorporated divisions instead of subsidiaries, then there would be reason to question its efficacy as a tool for rational antitrust enforcement. However, the Court is incorrect when it asserts, *ante*, at 770–771, 772–774, that there is no economic substance in a distinction between unincorporated divisions, which cannot provide a plurality of actors, and wholly owned subsidiaries, which under *Yellow Cab* can. If that were the case, incorporated subsidiaries would never be used to achieve integration—the ready availability of an unincorporated alternative would always be employed in order to avoid antitrust liability. The answer is provided by the Court itself—the use of subsidiaries often makes possible operating efficiencies that are unavailable through the use of unincorporated divisions. *Ante*, at 772–774. We may confidently assume that any corporate parent whose contingent antitrust liability exceeds the savings it realizes through the use of subsidiaries already utilizes unincorporated divisions instead of corporate subsidiaries. Thus, it is more than merely a question of form when a decision is made to use corporate subsidiaries instead of unincorporated divisions, and the rule is not that easily circumvented.

There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an actual or potential competitor of one of them; such a threat might be more potent coming from both corporations than from only one.[29]

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[28] See L. Sullivan, *supra* n. 9, § 114, at 328 ("To have two competitors acting concertedly two separate firms, not just persons, are needed. Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); see also Willis & Pitofsky, *supra* n. 9, at 38–41. The Attorney General's National Committee to Study the Antitrust Laws made the same point in 1955:

"The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Attorney General's Committee Report, *supra* n. 9, at 34.

In this case, it may be that notices to potential suppliers of respondent emanating from Copperweld carried more weight than would notices coming only from Regal. There was evidence suggesting that Regal and Copperweld were not integrated, and that the challenged agreement had little to do with achieving procompetitive efficiencies and much to do with protecting Regal's market position. The Court does not even try to explain why their common ownership meant that Copperweld and Regal were merely obtaining benefits associated with the efficiencies of integration. Both the District Court and the Court of Appeals thought that their agreement had a very different result—that it raised barriers to entry and imposed an appreciable marketwide restraint. The Court's discussion of the justifications for corporate affiliation is therefore entirely abstract—while it dutifully lists the procompetitive justifications for corporate affiliation, *ante*, at 772–774, it fails to explain how any of them relate to the conduct at issue in this case. What is challenged here is not the fact of integration between Regal and Copperweld, but their specific agreement with respect to Independence. That agreement concerned the exclusion of independence from the market, and not any efficiency resulting from integration. The facts of this very case belie the conclusion that affiliated corporations are incapable of engaging in the kind of conduct that threatens marketwide competition. The Court does not even attempt to assess the competitive significance of the conduct under challenge here—it never tests its economic assumptions against the concrete facts before it. Use of economic theory without reference to the competitive impact of the particular economic arrangement at issue is properly criticized when it produces overly broad *per se* rules of antitrust liability;[30] criticism is no less warranted when a *per se* rule of antitrust immunity is adopted in the same way.

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[29] Professor Sullivan provides another example:

"[P]icture a parent corporation and its wholly owned subsidiary (or two corporations wholly owned by the same parent or stockholder group) which operate, respectively, a newspaper and a radio station in the same city. If the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper, the integration between the two corporations, however close in terms of ownership or management or both, would not protect them from a charge of conspiracy to restrain trade. . . . [T]he concerted action here involved is not merely carrying on the business of a single integrated firm, it is action which is aimed at restraining trade by utilizing such market power as is possessed by the firm because of its radio station in order to erect a competitive barrier in front of a competitor of the firm's newspaper." L. Sullivan, *supra* n. 9, § 114, at 327 (footnote omitted).

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of *Colgate*. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can be easily fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent.

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[30] *E. g., Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).

UNITED STATES *v.* S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES) ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1349. Argued January 18, 1984—Decided June 19, 1984*

The Federal Aviation Act of 1958 directs the Secretary of Transportation to promote safety in air transportation by promulgating reasonable rules and regulations governing the inspection, servicing, and overhaul of civil aircraft. The Secretary, in her discretion, may prescribe the manner in which such inspection, servicing, and overhaul shall be made. In the exercise of this discretion, the Federal Aviation Administration (FAA), as the Secretary's designee, has devised a system of compliance review that involves certification of aircraft design and manufacture. Under this certification process, the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the regulations; the FAA then reviews the data by conducting a "spot check" of the manufacturer's work. Part of the FAA compliance procedure involves certification, whereby the FAA, if it finds that a proposed new type of aircraft comports with minimum safety standards, signifies its approval by issuing a type certificate. If an already certificated aircraft's design undergoes a major change, the FAA, if it approves the change, issues a supplemental type certificate. In No. 82-1349, a Boeing 707 commercial jet aircraft owned by respondent airline was flying from Rio de Janeiro to Paris when a fire broke out in one of the aft lavatories producing thick black smoke throughout the cabin. Despite a successful effort to land the plane, most of the passengers on board died from asphyxiation or the effects of toxic gases produced by the fire, and most of the plane's fuselage was consumed by the postimpact fire. Respondent airline's action against the United States under the Federal Tort Claims Act (Act or FTCA) seeking damages for the destroyed aircraft and a wrongful-death action by respondent families and representatives of the deceased passengers under the Act were consolidated in the Federal District Court. Respondents alleged that

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*Together with No. 82-1350, *United States* v. *United Scottish Insurance Co. et al.*, also on certiorari to the same court.

the Civil Aeronautics Agency, the FAA's predecessor, was negligent in issuing a type certificate for the Boeing 707 because the lavatory trash receptacle did not satisfy applicable safety regulations. The District Court granted summary judgment for the United States on the ground, *inter alia,* that recovery against the United States was barred by 28 U. S. C. § 2680(a), which provides that the Act shall not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (discretionary function exception). The Court of Appeals reversed, holding, *inter alia,* that the discretionary function exception did not apply. In No. 82–1350, an aircraft owned by respondent Dowdle and used in an air taxi service caught fire in midair in the forward baggage compartment, crashed, and burned, killing all the occupants. Respondent Dowdle filed an action under the FTCA for property damage and respondent insurance companies also filed an action under the Act seeking reimbursement for moneys paid for liability coverage on Dowdle's behalf. Respondents claimed that the Government was negligent in issuing a supplemental type certificate for the installation of a gasoline-burning cabin heater in the airplane that did not comply with the applicable FAA regulations. The District Court in California, upon finding that the crash resulted from defective installation of the heater, entered judgment for respondents under the California "Good Samaritan" rule, and the Court of Appeals affirmed.

Held: The actions are barred by the discretionary function exception of the FTCA. Pp. 807–821.

(a) It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. Moreover, the legislative history discloses that such exception was plainly intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Congress wished to prevent "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. Pp. 807–814.

(b) Here, the discretionary function exception precludes a tort action based upon the FAA's conduct in certificating the aircraft in question for use in commercial aviation. The FAA's implementation of a mechanism for compliance review is plainly discretionary activity of the "nature and quality" protected by § 2680(a). Judicial intervention, through private tort suits, in the FAA's decision to utilize a "spot-checking" program as the best way to accommodate the goal of air transportation safety and the reality of finite agency resources would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention that the discretionary function exception was designed to prevent. It follows that the acts of FAA employees in exercising the "spot-check" program are also protected by that exception, because respondents alleged only that the FAA failed to check particular items in the course of its review. Moreover, the risks encountered by these inspectors were encountered for the advancement of a governmental purpose and pursuant to a specific grant of authority. Pp. 814–820.

692 F. 2d 1205 and 692 F. 2d 1209, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Carter G. Phillips, Leonard Schaitman,* and *John C. Hoyle.*

Richard F. Gerry argued the cause for respondents in both cases and filed a brief for respondents in No. 82–1350. *Phillip D. Bostwick* and *James B. Hamlin* filed a brief for respondent Varig Airlines in No. 82–1349. *Robert R. Smiley III* filed a brief for respondents Mascher et al. in No. 82–1349.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these two cases to determine whether the United States may be held liable under the Federal Tort Claims Act, 28 U. S. C. §2671 *et seq.*, for the negligence of the Federal Aviation Administration in certificating certain aircraft for use in commercial aviation.

I

A. *No. 82–1349*

On July 11, 1973, a commercial jet aircraft owned by respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) was flying from Rio de Janeiro to Paris when a fire broke out in one of the aft lavatories. The fire produced a thick black smoke, which quickly filled the cabin and cockpit. Despite the pilots' successful effort to land the plane, 124 of the 135 persons on board died from asphyxiation or the effects of toxic gases produced by the fire. Most of the plane's fuselage was consumed by a postimpact fire.

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†*Marc S. Moller* and *Donald I. Marlin* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

The aircraft involved in this accident was a Boeing 707, a product of the Boeing Co. In 1958 the Civil Aeronautics Agency, a predecessor of the FAA, had issued a type certificate[1] for the Boeing 707, certifying that its designs, plans, specifications, and performance data had been shown to be in conformity with minimum safety standards. Seaboard Airlines originally purchased this particular plane for domestic use; in 1969 Seaboard sold the plane to respondent Varig Airlines, a Brazilian air carrier, which used the plane commercially from 1969 to 1973.

After the accident respondent Varig Airlines brought an action against the United States under the Federal Tort Claims Act seeking damages for the destroyed aircraft. The families and personal representatives of many of the passengers, also respondents here, brought a separate suit under the Act pressing claims for wrongful death. The two actions were consolidated in the United States District Court for the Central District of California.

Respondents asserted that the fire originated in the towel disposal area located below the sink unit in one of the lavatories and alleged that the towel disposal area was not capable of containing fire. In support of their argument, respondents pointed to an air safety regulation requiring that waste receptacles be made of fire-resistant materials and incorporate covers or other provisions for containing possible fires. 14 CFR § 4b.381(d) (1956). Respondents claimed that the CAA had been negligent when it inspected the Boeing 707 and issued a type certificate to an aircraft that did not comply with CAA fire protection standards. The District Court granted summary judgment for the United States on the ground that California law does not recognize an actionable tort duty for inspection and certification activities. The District Court also found that, even if respondents had stated a cause of action in tort, recovery against the United States was barred by two exceptions to the Act: the discretionary function exception, 28 U. S. C. § 2680(a),[2] and the misrepresentation exception, § 2680(h).[3]

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[1] Before introducing a new type of aircraft, a manufacturer must first obtain from the FAA a type certificate signifying that the basic design of the aircraft meets the minimum criteria specified in the safety regulations promulgated by the FAA. 49 U. S. C. § 1423(a); 14 CFR §§ 21.11–21.53 (1983). When applying for a type certificate, the manufacturer must supply the FAA with detailed plans, data, and documentation illustrating the aircraft design and demonstrating its compliance with FAA regulations. FAA employees or private employees who represent the FAA then examine the manufacturer's submission for conformity with the regulations. See *infra*, at 805–806.

The United States Court of Appeals for the Ninth Circuit reversed. 692 F. 2d 1205 (1982). The Court of Appeals reasoned that a private person inspecting and certificating aircraft for airworthiness would be liable for negligent inspection under the California "Good Samaritan" rule, see Restatement (Second) of Torts §§ 323 and 324A (1965), and concluded that the United States should be judged by the same rule. 692 F. 2d, at 1207–1208. The Court of Appeals rejected the Government's argument that respondents' actions were barred by 28 U. S. C. § 2680(h), which provides that the United States is not subject to liability for any claim arising out of misrepresentation. Interpreting respondents' claims as arising from the negligence of the CAA inspection rather than from any implicit misrepresentation in the resultant certificate, the Court of Appeals held that the misrepresentation exception did not apply. 692 F. 2d, at 1208. Finally, the Court of Appeals addressed the Government's reliance upon the discretionary function exception to the Act, 28 U. S. C. § 2680(a), which exempts the United States from liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . ." The Court of Appeals viewed the inspection of aircraft for compliance with air safety regulations as a function not entailing the sort of policymaking discretion contemplated by the discretionary function exception. 692 F. 2d, at 1208–1209.

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[2] Under 28 U. S. C. § 2680(a), the United States may not be held liable under the Act for:

"Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[3] Title 28 U. S. C. § 2680(h) states that the provisions of the Act shall not apply to "[a]ny claim arising out of . . . misrepresentation . . . ."

B. *No. 82–1350*

On October 8, 1968, a DeHavilland Dove aircraft owned by respondent John Dowdle and used in the operation of an air taxi service caught fire in midair, crashed, and burned near Las Vegas, Nev. The pilot, copilot, and two passengers were killed. The cause of the crash was an in-flight fire in the forward baggage compartment of the aircraft.

The DeHavilland Dove airplane was manufactured in the United Kingdom in 1951 and then purchased by Air Wisconsin, another air taxi operator. In 1965 Air Wisconsin contracted with Aerodyne Engineering Corp. to install a gasoline-burning cabin heater in the airplane. Aerodyne applied for, and was granted, a supplemental type certificate[4] from the FAA authorizing the installation of the heater. Aerodyne then installed the heater pursuant to its contract with Air Wisconsin. In 1966, relying in part upon the supplemental type certificate as an indication of the airplane's airworthiness, respondent Dowdle purchased the DeHavilland Dove from Air Wisconsin.

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[4] Any person who alters an aircraft by introducing a major change in the type design must obtain from the FAA a supplemental type certificate. 14 CFR § 21.113 (1983). In order to obtain such a certificate, the applicant must supply the FAA with drawings, plans, and other data sufficient to establish that the altered aircraft meets all applicable airworthiness requirements. § 21.115. See *infra*, at 806–807.

In the aftermath of the crash, respondent Dowdle filed this action for property damage against the United States under the Federal Tort Claims Act. Respondent insurance companies also filed suit under the Act, seeking reimbursement for moneys paid for liability coverage on behalf of Dowdle. The United States District Court for the Southern District of California found that the crash resulted from defects in the installation of the gasoline line leading to the cabin heater. The District Court concluded that the installation did not comply with the applicable FAA regulations and held that the Government was negligent in certifying an installation that did not comply with those safety requirements. Accordingly, the District Court entered judgment for respondents.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded for the District Court to consider whether the California courts would impose a duty of due care upon the Government by applying the "Good Samaritan" doctrine of §§ 323 and 324A of the Restatement (Second) of Torts. 614 F. 2d 188 (1979). The Court of Appeals also requested the District Court to determine whether, under the facts of this case, the California courts would find such a duty breached if a private person had issued the supplemental type certificate in question here. On remand, the District Court again entered judgment for respondents, finding that the California "Good Samaritan" rule would apply in this case and would give rise to liability on these facts.

On the Government's second appeal, the Ninth Circuit affirmed the judgment of the District Court. 692 F. 2d 1209 (1982). In so holding, the Court of Appeals followed reasoning nearly identical to that employed in its decision in No. 82–1349, decided the same day.

We granted certiorari, 461 U. S. 925 (1983), and we now reverse.

II

In the Federal Aviation Act of 1958, 49 U. S. C. § 1421(a)(1),[5] Congress directed the Secretary of Transportation to promote the safety of flight of civil aircraft in air commerce by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance. Congress also granted the Secretary the discretion to prescribe reasonable rules and regulations governing the inspection of aircraft, including the manner in which such inspections should be made. § 1421(a)(3). Congress emphasized, however, that air carriers themselves retained certain responsibilities to promote the public interest in air safety: the duty to perform their services with the highest possible degree of safety, § 1421(b), the duty to make or cause to be made every inspection required by the Secretary, § 1425(a), and the duty to observe and comply with all other administrative requirements established by the Secretary, § 1425(a).

Congress also established a multistep certification process to monitor the aviation industry's compliance with the requirements developed by the Secretary. Acting as the

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[5] In 1958, when the type certificate for the Boeing 707 aircraft owned by respondent Varig Airlines was issued, the Civil Aeronautics Act of 1938, 52 Stat. 1007, was the governing statute. Because the relevant provisions of the Federal Aviation Act are virtually identical to those of its predecessor, see Civil Aeronautics Act of 1938, §§ 601, 605, 52 Stat. 1007–1008, 1010–1011, for ease of reference we will refer only to the current version of the statute.

As originally enacted, the Federal Aviation Act vested in the Federal Aviation Agency all regulatory authority over aviation safety. See Pub. L. 85–726, § 101, 72 Stat. 737. This agency was later renamed the Federal Aviation Administration and placed in the Department of Transportation. Pub. L. 89–670, §§ 3(e), 6(c)(1), 80 Stat. 932, 938. All the functions, powers, and duties of the Federal Aviation Agency were then transferred to the Secretary of Transportation. § 6(c)(1), 80 Stat. 938.

Secretary's designee,[6] the FAA has promulgated a comprehensive set of regulations delineating the minimum safety standards with which the designers and manufacturers of aircraft must comply before marketing their products. See 14 CFR pts. 23, 25, 27, 29, 31, 33, and 35 (1983). At each step in the certification process, FAA employees or their representatives evaluate materials submitted by aircraft manufacturers to determine whether the manufacturer has satisfied these regulatory requirements. Upon a showing by the manufacturer that the prescribed safety standards have been met, the FAA issues an appropriate certificate permitting the manufacturer to continue with production and marketing.

The first stage of the FAA compliance review is type certification. A manufacturer wishing to introduce a new type of aircraft must first obtain FAA approval of the plane's basic design in the form of a type certificate. After receiving an application for a type certificate, the Secretary must "make, or require the applicant to make, such tests during manufacture and upon completion as the Secretary . . . deems reasonably necessary in the interest of safety. . . ." 49 U. S. C. § 1423(a)(2). By regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements. 14 CFR §§ 21.33, 21.35 (1983). The applicant submits to the FAA the designs, drawings, test reports, and computations necessary to show that the aircraft sought to be certificated satisfies FAA regulations. §§ 21.17(a)(1), 21.21(a)(b).[7] In the course of the type certification process, the manufacturer produces a prototype of the new aircraft and conducts both ground and flight tests. § 21.35. FAA employees or their representatives then review the data submitted by the applicant and make such inspections or tests as they deem necessary to ascertain compliance with the regulations. § 21.33(a). If the FAA finds that the proposed aircraft design comports with minimum safety standards, it signifies its approval by issuing a type certificate. 49 U. S. C. § 1423(a)(2); 14 CFR § 21.21(a)(1) (1983).

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[6] See Pub. L. 89-670, § 6(c)(1), 80 Stat. 938.

[7] One major manufacturer of commercial aircraft estimated that in the course of obtaining a type certificate for a new wide-body aircraft it would submit to the FAA approximately 300,000 engineering drawings and changes, 2,000 engineering reports, and 200 other reports. In addition, it would subject the aircraft to about 80 major ground tests and 1,600 hours of flight tests. National Research Council, Committee on FAA Airworthiness Certification Procedures, Improving Aircraft Safety 29 (1980) (hereinafter Improving Aircraft Safety).

Production may not begin, however, until a production certificate authorizing the manufacture of duplicates of the prototype is issued. 49 U. S. C. § 1423(b). To obtain a production certificate, the manufacturer must prove to the FAA that it has established and can maintain a quality control system to assure that each aircraft will meet the design provisions of the type certificate. 14 CFR §§ 21.139, 21.143 (1983). When it is satisfied that duplicate aircraft will conform to the approved type design, the FAA issues a production certificate, and the manufacturer may begin mass production of the approved aircraft.

Before any aircraft may be placed into service, however, its owner must obtain from the FAA an airworthiness certificate, which denotes that the particular aircraft in question conforms to the type certificate and is in condition for safe operation. 49 U. S. C. § 1423(c). It is unlawful for any person to operate an aircraft in air commerce without a valid airworthiness certificate. § 1430(a).

An additional certificate is required when an aircraft is altered by the introduction of a major change in its type design. 14 CFR § 21.113 (1983). To obtain this supplemental type certificate, the applicant must show the FAA that the altered aircraft meets all applicable airworthiness requirements. § 21.115(a). The applicant is responsible for conducting the inspections and tests necessary to demonstrate that each change in the type design complies with the regulations. §§ 21.115(b), 21.33(b). The methods used by FAA employees or their representatives to determine an applicant's compliance with minimum safety standards are generally the same as those employed for basic type certification. FAA Order 8110.4, Type Certification 32 (1967) (hereinafter FAA Order 8110.4); CAA Manual of Procedure, Flight Operations and Airworthiness, Type Certification §.5106(a) (1957) (hereinafter CAA Manual of Procedure).

With fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, 49 U. S. C. § 1355 authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process. 14 CFR § 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. See generally Improving Aircraft Safety 29–30. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. 14 CFR § 183.1 (1984). In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees. FAA Order 8110.4, p. 151; CAA Manual of Procedure §.70(b). FAA employees may briefly review the reports and other data submitted by representatives before certificating a subject aircraft. Improving Aircraft Safety 31–32; FAA Order 8110.4, p. 159; CAA Manual of Procedure §.77.

III

The Federal Tort Claims Act, 28 U. S. C. § 1346(b), authorizes suits against the United States for damages

> "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omis-

> sion of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The Act further provides that the United States shall be liable with respect to tort claims "in the same manner and to the same extent as a private individual under like circumstances." § 2674.

The Act did not waive the sovereign immunity of the United States in all respects, however; Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims. Of particular relevance here, 28 U. S. C. § 2680(a) provides that the Act shall not apply to

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*" (Emphasis added.)

The discretionary function exception, embodied in the second clause of § 2680(a), marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.

Although the Court has previously analyzed the legislative history of § 2680(a), see *Dalehite* v. *United States*, 346 U. S. 15, 26–30 (1953), we briefly review its highlights for a proper understanding of the application of the discretionary function exception to this case. During the years of debate and discussion preceding the passage of the Act, Congress considered a number of tort claims bills including exceptions from the waiver of sovereign immunity for claims based upon the activities of specific federal agencies, notably the Federal Trade Commission and the Securities and Exchange Commission. See, *e. g.*, H. R. 5373, 77th Cong., 2d Sess. (1942); H. R. 7236, 76th Cong., 1st Sess. (1940); S. 2690, 76th Cong., 1st Sess. (1939).[8] In 1942, however, the 77th Congress eliminated the references to these particular agencies and broadened the exception to cover all claims based upon the execution of a statute or regulation or the performance of a discretionary function. H. R. 6463, 77th Cong., 2d Sess. (1942); S. 2207, 77th Cong., 2d Sess. (1942). The language of the exception as drafted during the 77th Congress is identical to that of § 2680(a) as ultimately adopted.

The legislative materials of the 77th Congress illustrate most clearly Congress' purpose in fashioning the discretionary function exception. A Government spokesman appearing before the House Committee on the Judiciary described the discretionary function exception as a "highly important exception:"

> "[It is] designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control Office of the Treasury, or others. It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium

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[8] For example, § 303(7) of H. R. 7236, 76th Cong., 1st Sess. (1940), provided that the waiver of sovereign immunity should not extend to "[a]ny claim for damages caused by the administration of any law or laws by the Federal Trade Commission or by the Securities and Exchange Commission."

> of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.
>
> "On the other hand, the common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill." Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea).[9]

It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action. *Id.*, at 29; *id.*, at 37, Memorandum, with Appendixes, Federal Tort Claims Act (explanatory of Comm. Print of H. R. 5373, 1942). It was considered unnecessary to except by name such agencies as the Federal Trade Commission and the Securities and Exchange Commission, as had earlier bills, because the language of the discretionary function exception would "exemp[t] from the act claims against Federal agencies *growing out of their regulatory activities.*" *Id.*, at 8 (emphasis added).

The nature and scope of § 2680(a) were carefully examined in *Dalehite* v. *United States*, *supra*. *Dalehite* involved vast claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to devastated areas occupied by the Allied Armed Forces after World War II. Numerous acts of the Government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.

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[9] The Committee incorporated the Government's view into its Report almost verbatim. H. R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942).

The Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the action barred by § 2680(a). Describing the discretion protected by § 2680(a) as "the discretion of the executive or the administrator to act according to one's judgment of the best course," *id.*, at 34, the Court stated:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.*, at 35–36 (footnotes omitted).

Respondents here insist that the view of § 2680(a) expressed in *Dalehite* has been eroded, if not overruled, by subsequent cases construing the Act, particularly *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955), and *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 95 U. S. App. D. C. 189, 221 F. 2d 62, summarily aff'd *sub nom. United States* v. *Union Trust Co.*, 350 U. S. 907 (1955). While the Court's reading of the Act admittedly has not followed a straight line, we do not accept the supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception.

Indian Towing Co. v. *United States, supra,* involved a claim under the Act for damages to cargo aboard a vessel that ran aground, allegedly owing to the failure of the light in a lighthouse operated by the Coast Guard. The plaintiffs contended that the Coast Guard had been negligent in inspecting, maintaining, and repairing the light. Significantly, the Government *conceded* that the discretionary function exception was not implicated in *Indian Towing*, arguing instead that the Act contained an implied exception from liability for "uniquely governmental functions." *Id.*, at 64. The Court rejected the Government's assertion, reasoning that it would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." *Id.*, at 65.

In *Eastern Air Lines, Inc.* v. *Union Trust Co., supra,* two aircraft collided in midair while both were attempting to land at Washington National Airport. The survivors of the crash victims sued the United States under the Act, asserting the negligence of air traffic controllers as the cause of the collision. The United States Court of Appeals for the District of Columbia Circuit permitted the suit against the Government. In its petition for certiorari, the Government urged the adoption of a "governmental function exclusion" from liability under the Act and pointed to § 2680(a) as textual support for such an exclusion. Pet. for Cert. in *United States* v. *Union Trust Co.*, O. T. 1955, No. 296, p. 18. The Government stated further that § 2680(a) was "but one aspect of the broader exclusion from the statute of claims based upon the performance of acts of a uniquely governmental nature." *Id.*, at 37. This Court summarily affirmed, citing *Indian Towing Co.* v. *United States, supra.* 350 U. S. 907 (1955). Given the thrust of the arguments presented in the petition for certiorari and the pointed citation to *Indian Towing*, the summary disposition in *Union Trust Co.* cannot be taken as a wholesale repudiation of the view of § 2680(a) set forth in *Dalehite.*[10]

As in *Dalehite,* it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception. From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite,* the exception covers "[n]ot only agencies of government . . . but all employees exercising discretion." 346 U. S., at 33. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.

Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[11] Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name. See *supra*, at 808–810. This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States* v. *Muniz*, 374 U. S. 150, 163 (1963).

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[10] Respondents' reliance upon *Rayonier, Inc.* v. *United States,* 352 U. S. 315 (1957), is equally misplaced. In *Rayonier* the Court revisited an issue considered briefly in *Dalehite:* whether the United States may be held liable for the alleged negligence of its employees in fighting a fire. In *Dalehite,* the Court held that alleged negligence in firefighting was not actionable under the Act, basing its decision upon "the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights." *Dalehite* v. *United States,* 346 U. S., at 43. In so holding, the *Dalehite* Court did not discuss or rely upon the discretionary function exception. The *Rayonier* Court rejected the reasoning of *Dalehite* on the ground that the liability of the United States under the Act is not restricted to that of a municipal corporation or other public body. *Rayonier, Inc.* v. *United States, supra,* at 319 (citing *Indian Towing Co.* v. *United States,* 350 U. S. 61 (1955)). While the holding of *Rayonier* obviously overrules one element of the judgment in *Dalehite,* the more fundamental aspects of *Dalehite,* including its construction of § 2680(a), remain undisturbed.

IV

We now consider whether the discretionary function exception immunizes from tort liability the FAA certification process involved in these cases. Respondents in No. 82–1349 argue that the CAA was negligent in issuing a type certificate for the Boeing 707 aircraft in 1958 because the lavatory trash receptacle did not satisfy applicable safety regulations. Similarly, respondents in No. 82–1350 claim negligence in the FAA's issuance of a supplemental type certificate in 1965 for the DeHavilland Dove aircraft; they assert that the installation of the fuel line leading to the cabin heater violated FAA airworthiness standards. From the records in these cases there is no indication that either the Boeing 707 trash receptacle or the DeHavilland Dove cabin heater was actually inspected or reviewed by an FAA inspector or representative. Brief for Respondent Varig Airlines in No. 82–1349, pp. 8, 15; Brief for United States 10, n. 10, and 37. Respondents thus argue in effect that the negligent failure of the FAA to inspect certain aspects of aircraft type design in the process of certification gives rise to a cause of action against the United States under the Act.

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[11] Even the dissenters in *Dalehite* read the legislative history of the discretionary function exception as protecting "that type of discretion which government agencies exercise in regulating private individuals." *Dalehite* v. *United States*, 346 U. S., at 58, n. 12 (Jackson, J., joined by Black and Frankfurter, JJ., dissenting).

The Government, on the other hand, urges that the basic responsibility for satisfying FAA air safety standards rests with the *manufacturer*, not with the FAA. The role of the FAA, the Government says, is merely to police the conduct of private individuals by monitoring their compliance with FAA regulations. According to the Government, the FAA accomplishes its monitoring function by means of a "spot-check" program designed to encourage manufacturers and operators to comply fully with minimum safety requirements. Such regulatory activity, the Government argues, is the sort of governmental conduct protected by the discretionary function exception to the Act.[12] We agree that the discretionary function exception precludes a tort action based upon the conduct of the FAA in certificating these aircraft for use in commercial aviation.

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[12] The Government presses two additional arguments in support of reversal. First, the Government asserts that the conduct of the FAA in certificating aircraft is a core governmental activity that is not actionable under the Act, because no private individual engages in analogous activity. See 28 U. S. C. §§ 1346(b) and 2674. Second, the Government interprets respondents' claims as based upon misrepresentations contained in the certificates and argues that they are barred by the misrepresentation exception to the Act. § 2680(h); see n. 4, *supra*. Respondents urge that the first argument is precluded by *Indian Towing Co.* v. *United States*, *supra*, and the second by our decision last Term in *Block* v. *Neal*, 460 U. S. 289 (1983). Because we rest our decision today upon the discretionary function exception, we find it unnecessary to address these additional issues.

The Government also argues that the Court of Appeals erred in applying California's "Good Samaritan" doctrine to the FAA certification process. See *supra*, at 801, 803. But the application of the "Good Samaritan" doctrine is at bottom a question of state law, and we generally accord great deference to the interpretation and application of state law by the Courts of Appeals. See, *e. g.*, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U. S. 190, 214 (1983); *Runyon* v. *McCrary*, 427 U. S. 160, 181–182 (1976) (quoting *Bishop* v. *Wood*, 426 U. S. 341, 346, and n. 10 (1976)). We thus decline the Government's invitation to undertake our own examination of this state-law issue.

As noted *supra*, at 804, the Secretary of Transportation has the duty to promote safety in air transportation by promulgating reasonable rules and regulations governing the inspection, servicing, and overhaul of civil aircraft. 49 U. S. C. § 1421(a)(3)(A). In her discretion, the Secretary may also prescribe

> "the periods for, and *the manner in, which such inspection, servicing, and overhaul shall be made*, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretarty of Transportation may accept in lieu of those made by its officers and employees." § 1421(a)(3)(C) (emphasis added).

Thus, Congress specifically empowered the Secretary to establish and implement a mechanism for enforcing compliance with minimum safety standards according to her "judgment of the best course." *Dalehite* v. *United States*, 346 U. S., at 34.

In the exercise of this discretion, the FAA, as the Secretary's designee, has devised a system of compliance review that involves certification of aircraft design and manufacture at several stages of production. See *supra*, at 804–806. The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance.[13] Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a "spot check" of the manufacturer's work.

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[13] This premise finds ample support in the statute and regulations. See, *e. g.*, 49 U. S. C. § 1421(b) (duty rests on air carriers to perform their services with highest possible degree of safety); § 1425(a) (air carrier has duty to make or cause to be made inspections required by Secretary and duty to comply with regulations); 14 CFR § 21.17 (1983) (applicant for type

The operation of this "spot-check" system is outlined in detail in the handbooks and manuals developed by the CAA and FAA for the use of their employees. For example, the CAA Manual of Procedure for type certification in effect at the time of the certification of the Boeing 707 provided:

> "Conformity determination may be varied depending upon circumstances. *A manufacturer's policies, quality control procedures, experience, inspection personnel, equipment, and facilities will dictate the extent of conformity inspection to be conducted or witnessed by [CAA employees].* Differences between manufacturers require that the conformity program be adjusted to fit existing conditions. In the case of an inexperienced manufacturer whose ability is unknown, it may be necessary to conduct a high percentage of conformity inspections until such time as the [CAA] inspector feels he can safely rely to a greater degree upon the company inspectors. *He may then gradually reduce his own inspection or witnessing accordingly.*
>
> "Experienced manufacturers having previously demonstrated the acceptability of their quality control and inspection competence . . . should benefit by greater [CAA] confidence. *In such cases, conformity determination may be made through a planned system of spot-checking critical parts and assemblies and by reviewing inspection records and materials review dispo-*

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certificate must show that aircraft meets applicable requirements); § 21.33 (applicant for type certifcate must conduct all tests and inspections necessary to determine compliance); § 21.35 (specifying tests that must be made by applicants for type certificates).

> *sitions. . . . It is not intended that the inspector personally conduct a complete conformity inspection of each part he records on a [CAA] form.* He should, however, visually inspect and witness the manufacturer's inspection of the critical characteristics. . . . In a program of this type, increased confidence in the manufacturer, plus a planned program of spot-checking by [CAA employees], should result in obtaining increased knowledge of conformity of the end product. . . .
>
> "Regardless of the manufacturer's experience, it is the [CAA] inspector's responsibility to assure that a complete conformity inspection has been performed *by the manufacturer* and that the results of this inspection are properly recorded and reported." CAA Manual of Procedure §.330 (emphasis added).

See also FAA Order 8110.4, pp. 39–40.

As to the engineering review of an application for a type certificate, the CAA materials note that only a "relatively small number of engineers" are available to evaluate for compliance with air safety regulations the data submitted by applicants. Accordingly, the Manual states:

> *"It is obvious that complete detailed checking of data is not possible. Instead, an overriding check method should be used* [which] is predicated on the fact that the applicant has completely checked all data presented for examination. These data are to be examined in turn by the [CAA] engineer for method and completeness, and *with sufficient spot-checking to ascertain that the design complies with the minimum airworthiness requirements.*" CAA Manual of Procedure §.41 (emphasis added).

See also FAA Order 8110.4, p. 60.[14]

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[14] In a recent report, the National Academy of Sciences recognized that because "FAA engineers cannot review each of the thousands of drawings,

The procedure for supplemental type certification is much the same. According to the Manual of Procedure applicable to the supplemental type certification of the DeHavilland Dove, an applicant must submit to the FAA data describing the proposed change in type design, which may be accompanied by drawings or photographs of the suggested alteration. The methods for determining compliance with applicable safety regulations are generally the same as those used for basic type certification. Physical inspections of the proposed modification in type design are required when compliance with the applicable regulations "cannot be determined adequately from an evaluation of the technical data." CAA Manual of Procedure § 5106(b). Moreover, FAA representatives are authorized to approve data covering major changes in type design and obtain supplemental type certifications without prior review by the FAA. *Id.* § 764(a). See also FAA Order 8110.4, pp. 31–32, 158.

Respondents' contention that the FAA was negligent in failing to inspect certain elements of aircraft design before certificating the Boeing 707 and DeHavilland Dove necessarily challenges two aspects of the certification procedure: the FAA's decision to implement the "spot-check" system of compliance review, and the application of that "spot-check" system to the particular aircraft involved in these cases. In our view, both components of respondents' claim are barred by the discretionary function exception to the Act.

The FAA's implementation of a mechanism for compliance review is plainly discretionary activity of the "nature and quality" protected by § 2680(a). When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory

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calculations, reports, and tests involved in the type certification process," the agency must place great reliance on the manufacturer. Improving Aircraft Safety 6, 29, 31. The report also noted that "in most cases the FAA staff performs only a cursory review of the substance of th[e] overwhelming volume of documents" submitted for its approval. *Id.*, at 31–32.

authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

It follows that the acts of FAA employees in executing the "spot-check" program in accordance with agency directives are protected by the discretionary function exception as well. See *Dalehite* v. *United States*, 346 U. S., at 36. The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

V

In rendering the United States amenable to some suits in tort, Congress could not have intended to impose liability for the regulatory enforcement activities of the FAA challenged in this case. The FAA has a statutory duty to *promote* safety in air transportation, not to insure it. We hold that these actions against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act. Accordingly, the judgments of the United States Court of Appeals for the Ninth Circuit are reversed.

It is so ordered.

UNITED STATES *v.* MORTON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 83-916. Argued April 25, 1984—Decided June 19, 1984

When respondent, an Air Force Colonel, was stationed in Alaska, the Finance Office of his base received by certified mail a writ of garnishment, accompanied by a copy of a judgment against respondent that had been issued by an Alabama state court in a divorce proceeding. The writ directed the Air Force to withhold $4,100 of respondent's pay to satisfy sums due under the judgment for alimony and child support. Upon being notified of the writ, respondent told the Finance Office that the Alabama court's order was void because the court had no jurisdiction over him. Nevertheless, the Finance Office honored the writ and paid $4,100 to the Alabama court, deducting that amount from respondent's pay. Subsequently, respondent brought an action against the United States in the Court of Claims to recover the amount that had been withheld from his pay. The Government submitted as a complete defense 42 U. S. C. § 659(f), which provides, in connection with § 659(a) making federal employees, including members of the Armed Services, subject to legal process to enforce their child support and alimony payment obligations, that "[n]either the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face," if such payment is made in accordance with the statute and the implementing regulations. The Court of Claims held that the writ of garnishment was not "legal process" within the meaning of § 659(f) because the definition of that term in 42 U. S. C. § 662(e) requires that it be issued by a "court of competent jurisdiction," that the Alabama court was not such a court because it did not have personal jurisdiction over respondent, and that therefore respondent was entitled to recover the amount claimed. The Court of Appeals affirmed, holding that when an obligor notifies the Government that the court issuing the garnishment order does not have personal jurisdiction over him the order does not constitute "legal process regular on its face" within the meaning of § 659(f).

Held: The Government cannot be held liable for honoring a writ of garnishment, such as the one in question here, which is "regular on its face" and has been issued by a court with subject-matter jurisdiction to issue such orders. Pp. 827–836.

(a) The words "legal process" in § 659(f) must be read in light of the immediately following phrase—"regular on its face." That phrase makes it clear that the term "legal process" does not require the issuing court to have personal jurisdiction. The plain language of § 659(f) cannot be escaped simply because the obligor may have provided some information casting doubt on the issuing court's jurisdiction over him. An inquiry into that court's jurisdiction over the obligor cannot be squared with that plain language, which requires the recipient of the writ to act on the basis of the "face" of the process. Pp. 827–829.

(b) The legislative history shows that Congress did not contemplate the kind of inquiry into personal jurisdiction that the Court of Appeals' holding would require. That history, as well as the plain language of § 659(a), also indicates that Congress intended the Government to receive the same treatment as a private employer with respect to garnishment orders, whereby, in the great majority of jurisdictions in the United States, an employer, upon complying with a garnishment order, is discharged of liability to the judgment debtor to the extent of the payment made. Moreover, burdening the garnishment process with inquiry into the issuing court's jurisdiction over the debtor would only frustrate the fundamental purpose of § 659 of remedying the plight of persons left destitute because they had no speedy and efficacious means of ensuring that their child support and alimony would be paid. Pp. 829–834.

(c) Controlling weight must be given to the implementing regulations that expressly provide that when the Government receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the Government is not required to ascertain whether the issuing authority had obtained personal jurisdiction over the obligor. These regulations cannot possibly be considered "clearly inconsistent" with the statute or "arbitrary," and they further the congressional intent to facilitate speedy enforcement of garnishment orders and to minimize the burden on the Goverment. Pp. 834–836.

708 F. 2d 680, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Michael W. McConnell argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Leonard Schaitman*, *Wendy M. Keats*, and *Mary S. Mitchelson*.

Kaletah N. Carroll argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the United States is liable for sums withheld from the pay of one of its employees because it complied with a direction to withhold those sums contained in a writ of garnishment issued by a court without personal jurisdiction over the employee.

On December 27, 1976, respondent, a Colonel in the United States Air Force, was stationed at Elmendorf Air Force Base in Alaska. On that date Elmendorf's Finance Office received by certified mail a writ of garnishment, accompanied by a copy of a judgment against respondent that had been issued by the Circuit Court for the Tenth Judicial Circuit of Alabama in a divorce proceeding. The writ, which was in the regular form used in Alabama, directed the Air Force to withhold $4,100 of respondent's pay to satisfy sums due under the judgment "for alimony and child support." The Finance Office promptly notified respondent that it had received the writ. On advice from an Air Force attorney, respondent told the Finance Office that the state court's order was void because the Alabama court had no jurisdiction over him. Nevertheless, the Finance Officer honored the writ and paid $4,100 to the Clerk of the Alabama court, deducting that amount from respondent's pay. Subsequently additional writs of garnishment were served on the Air Force with similar results.

Respondent apparently never made any attempt to contest the garnishment itself beyond his initial protest to the Elmendorf Finance Office.[1] Eventually, however, he in effect collaterally attacked the garnishment by bringing this action against the United States to recover the amounts that had been withheld from his pay and remitted to the Alabama court. The Government took the position that it had a complete defense since Congress has by statute provided:

**Dan M. Kinter* filed a brief for Sacramento County, California, et al. as *amici curiae* urging reversal.

[1] The trial court found that after respondent was first notified of the service of the writ, the Air Force attorney he consulted assured him that he could ignore the writ because he was not within the jurisdiction of the state court. Apparently the only remedy respondent has ever sought with respect to the garnishment of his salary is the instant action.

> "Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." 42 U. S. C. § 659(f).

The trial judge first noted that the Alabama writ was on the regular form used by the Alabama courts. Thus, he did not disagree with the Government's position that the writ was "regular on its face" within the meaning of the statute. He held, however, that the writ was not "legal process" within the meaning of § 659(f) because the statutory definition of that term requires that it be issued by a "court of competent jurisdiction."[2] He reasoned that the portion of the divorce decree ordering respondent to make alimony and child support payments had not been issued by a court of competent jurisdiction because the Alabama court did not have personal jurisdiction over respondent. Since respondent was not domiciled in Alabama at the time of the divorce proceedings, and since Alabama did not then have a statute authorizing personal service on nonresidents for child support or alimony and could not assert jurisdiction under either its own law or the Due Process Clause because it lacked sufficient contacts with respondent, the trial judge concluded that the Alabama judgment on which the garnishment orders were based was void for lack of jurisdiction. Accordingly, the trial judge held that respondent was entitled to recover the amounts withheld from his pay from the United States.

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[2] The statute provides:

"The term 'legal process' means any writ, order, summons, or other similar process in the nature of garnishment, which—

"(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States . . . and

"(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments." 42 U. S. C. § 662(e).

The Court of Appeals for the Federal Circuit affirmed, 708 F. 2d 680 (1983). It concluded that when an obligor notifies the Government that the court issuing the garnishment order does not have personal jurisdiction over him, the order does not constitute "legal process regular on its face" within the meaning of the statute. Judge Nies dissented, reasoning that the statute required only that the state court have subject-matter jurisdiction to enter the writ of garnishment, and that the notice respondent had provided the disbursing officer did not affect the question whether the Alabama court was a "court of competent jurisdiction."

Because the holding of the Federal Circuit creates a substantial risk of imposing significant liabilities upon the United States as a result of garnishment proceedings, and because the decision below created a conflict in the Circuits,[3] we granted the Government's petition for certiorari, 465 U. S. 1004 (1984).

I

Ten years ago Congress decided that compensation payable to federal employees, including members of the Armed Services, should be subject to legal process to enforce employees' obligations to provide child support or make alimony payments. Section 459(a) of the Social Services Amendments of 1974, 88 Stat. 2357–2358, was enacted as a result. As amended, it currently provides:

> "Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is

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[3] See *Calhoun* v. *United States*, 557 F. 2d 401 (CA4), cert. denied, 434 U. S. 966 (1977).

> based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments." 42 U. S. C. § 659(a).

In 1977 Congress amended the statute by specifying a procedure for giving notice to affected employees, directing that the normal federal pay and disbursement cycle should not be modified to comply with garnishment writs, authorizing promulgation of appropriate implementing regulations, and defining terms such as "alimony," "child support," and "legal process." It also added subparagraph (f), the provision at issue in this case. See 91 Stat. 157–162.[4]

II

We assume, as does the Government, that the Alabama court lacked jurisdiction over respondent when it issued its writs of garnishment. Based on that assumption, respondent defends the judgment below by arguing that the Alabama court was not a "court of competent jurisdiction," and hence its orders could not satisfy the statutory definition of "legal process."[5]

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[4] Although at least the initial garnishment in this case occurred prior to the passage of the 1977 amendment, the parties agree that the statute as amended in 1977 applies to this case.

[5] This is, however, the only ground on which respondent attacks the enforcement of the writs of garnishment. Thus, no question is raised concerning the sufficiency of the notice and opportunity to contest the garnishment that respondent received prior to the execution of the writs, see generally *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395

If we were to look at the words "competent jurisdiction" in isolation, we would concede that the statute is ambiguous. The concept of a court of "competent jurisdiction," though usually used to refer to subject-matter jurisdiction,[6] has also been used on occasion to refer to a court's jurisdiction over the defendant's person.[7] We do not, however, construe statutory phrases in isolation; we read statutes as a whole.[8] Thus, the words "legal process" must be read in light of the immediately following phrase—"regular on its face." That phrase makes it clear that the term "legal process" does not require the issuing court to have personal jurisdiction.

Subject-matter jurisdiction defines the court's authority to hear a given type of case, whereas personal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum. See *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 701–703, and n. 10 (1982). The strength of this interest in a particular case cannot be ascertained from the "face" of the process; it can be

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U. S. 337 (1969); and in particular no question is raised as to whether respondent was afforded an adequate opportunity to contest the jurisdiction of the court issuing the writ in the jurisdiction where the writ was enforced, see generally *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416 (1957); *May* v. *Anderson*, 345 U. S. 528 (1953); *Estin* v. *Estin*, 334 U. S. 541, 548–549 (1948); *Griffin* v. *Griffin*, 327 U. S. 220 (1946).

[6] As far back as *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), we drew a clear distinction between a court's "competence" and its jurisdiction over the parties:

"To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.*, at 733.

[7] See Restatement (Second) of Judgments § 11, Comment *a* (1982).

[8] See, *e. g.*, *Stafford* v. *Briggs*, 444 U. S. 527, 535 (1980); *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395, 403 (1975); *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 185 (1971).

determined only by evaluating a specific aggregation of facts, as well as the possible vagaries of the law of the forum, and then determining if the relationship between the defendant—in this case the obligor—and the forum, or possibly the particular controversy, makes it reasonable to expect the defendant to defend the action that has been filed in the forum State.[9] The statutory requirement that the garnishee refer only to the "face" of the process is patently inconsistent with the kind of inquiry that may be required to ascertain whether the issuing court has jurisdiction over the obligor's person.[10]

Nor can the plain language of § 659(f) be escaped simply because the obligor may have provided some information that raises a doubt concerning the issuing court's jurisdiction over him, as he must do under the Court of Appeals' holding. In such a case the determination would be based on the information provided by the obligor, rather than, as is required by the statute, "on the face" of the writ of garnishment. The writ is simply a direction to the garnishee; it contains no information shedding light upon the issuing court's jurisdiction over the obligor. Inquiry into the issuing court's jurisdiction over the debtor cannot be squared with the plain language of the statute, which requires the recipient of the writ to act on the basis of the "face" of the process.

III

The legislative history does not contain any specific discussion of the precise question presented by this case. It does, however, show that Congress did not contemplate the kind of inquiry into personal jurisdiction that the Court of Appeals' holding would require, and it plainly identifies legislative objectives that would be compromised by requiring such an inquiry.

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[9] See, *e. g., Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 775–776 (1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292 (1980); *Shaffer* v. *Heitner*, 433 U. S. 186, 203–204 (1977).

[10] The Comptroller General wrote in a similar case:

"The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular 'on its face' means just that. Facial validity of a writ need not be determined 'upon the basis of scrutiny by a trained legal mind,' nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing the writ may know." *In re Mathews*, 61 Comp. Gen. 229, 230–231 (1982).

In colloquy on the floor of the House during the consideration of the 1974 legislation, two of its principal sponsors made it clear that no more than the face of the writ of garnishment was to be the basis for the garnishment of a federal employee's salary:

> "Mr. ST GERMAIN. Essentially, the mother or the wife goes into the State court and gets a judgment, and then proceeds on the judgment, on the execution of same, and proceeds with the garnishment; is that not correct?
>
> "Mr. ULLMAN. The gentleman is correct.
>
> "Mr. ST GERMAIN. And there are no other conditions precedent?
>
> "Mr. ULLMAN. The garnishment is on the basis of the court order or decision. It is on the basis of the court order or by trial by the court in the case of a father or mother failing to live up to his or her obligations.
>
> "Mr. ST GERMAIN. That is correct. Or with alimony?
>
> "Mr. ULLMAN. That is right, with alimony." 120 Cong. Rec. 41810 (1974).[11]

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[11] Moreover, the floor debates also indicate that Congress envisioned garnishments based on foreign judgments against nonresident debtors under the statute:

"[Mr. WHITE.] As I read the conference report, a paternity suit could be brought in another State, a judgment rendered in that State, and then the judgment brought back into Texas where there is no paternity suit action line and brought into a U. S. Federal court and file a garnishment against social security and veterans' benefits, is this true?

"Mr. PETTIS. I understand that is correct." 120 Cong. Rec. 41813 (1974).

Of course, it would be impossible to inquire into personal jurisdiction based on nothing more than the court order. No such inquiry could have been intended.[12]

The liability of private employers under similar circumstances is also illuminating. The legislative history, as well as the plain language of § 659(a), indicates that Congress intended the Government to receive the same treatment as a private employer with respect to garnishment orders.[13] A

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[12] The 1977 amendment of the statute, adding § 659(f), did not alter this state of affairs, since it specifies only those circumstances in which the Government is not liable. In fact, the legislative history of the amendment indicates that it was intended only to clarify the law. See H. R. Conf. Rep. No. 95-263, p. 35 (1977); 123 Cong. Rec. 12909 (1977) (remarks of Sens. Curtis and Nunn). Inquiry into personal jurisdiction would actually be inconsistent with the intent of the 1977 amendment of the statute. In a memorandum explaining the amendment, its sponsors indicated that they intended federal agencies to respond to garnishment orders promptly:

"The amendment provides specific conditions and procedures to be followed under section 459. It specifies that service of legal process brought for the enforcement of an individual's obligation to provide child support or alimony is to be accomplished by certified or registered mail, or by personal service, upon the person designated to accept the service for a government entity. The process must be accomplished by sufficient data to permit prompt identification of the individual and the moneys which are involved. These provisions will permit inexpensive and expedited service and will enable the agency to respond in an efficient way." *Id.*, at 12912.

This explanatory material was taken from the Report on a virtually identical bill which had been reported by the Senate Finance Committee during the preceding session of Congress. See S. Rep. No. 94-1350, p. 4 (1976). The 1977 amendment's language and intent was substantially the same as this earlier version, 123 Cong. Rec. 12909 (1977) (remarks of Sens. Curtis and Nunn). This twice-stated congressional goal of speed and efficiency would be seriously undermined if the Government could not rely on the face of the garnishment order and instead had to inquire into the circumstances relating to the issuing court's jurisdiction over the obligor.

[13] For example, the explanatory material accompanying the 1977 amendment stated:

"It should be emphasized that the fact that section [6]59 is applicable to particular moneys does not necessarily mean that those moneys will be construction of the statute that would impose liability on the Government for honoring a writ issued by a court with subject-matter jurisdiction would be inconsistent with the law applicable to private garnishees. It has long been the rule that at least when the obligor receives notice of the garnishment, the garnishee cannot be liable for honoring a writ of garnishment. See *Harris* v. *Balk*, 198 U. S. 215, 226–227 (1905). For example, after imposing on all employers a duty to honor writs of garnishment, the District of Columbia Code, which Congress itself enacted, see 77 Stat. 555, provides:

> "Any payments made by an employer-garnishee in conformity with this section shall be a discharge of the liability of the employer to the judgment debtor to the extent of the payment." D. C. Code § 16–573(c) (1981).

The law in Alaska and Alabama is to similar effect,[14] as it is in the great majority of jurisdictions.[15] Thus, to hold the Gov-

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subject to legal process; it merely means that the question of whether such moneys will be subject to legal process will be determined in accordance with State law in like manner as if the United States were a private person." *Id.*, at 12914.

See also S. Rep. No. 94–1350, p. 9 (1976); S. Rep. No. 93–1356, pp. 53–54 (1974); 120 Cong. Rec. 40338–40339 (1974) (remarks of Sen. Montoya); *id.*, at 41810 (remarks of Reps. Ullman and Waggonner).

[14] See Ala. Code §§ 6–6–453(a), 6–6–461 (1975); Alaska Stat. Ann. § 09.40.040 (1983).

[15] See, *e. g.*, Ariz. Rev. Stat. Ann. § 12–1592 (1982); Ark. Stat. Ann. § 31–146 (1962); Cal. Civ. Proc. Code Ann. § 706.154(b) (West Supp. 1984); Idaho Code § 8–510 (1979); Ill. Rev. Stat., ch. 110, § 12–812 (1983); Ind. Code § 34–1-11–29 (1982); Iowa Code § 642.18 (1983); Md. Cts. & Jud. Proc. Code Ann. § 11–601(a) (1984); Mass. Gen. Laws Ann., ch. 246, § 43 (West 1959); Mich. Comp. Laws § 600.4061(3) (1968); Minn. Stat. § 571.54 (1982); Miss. Code Ann. § 11–35–37 (1972); Mo. Rev. Stat. § 525.070 (1978); N. H. Rev. Stat. Ann. § 512:38 (1983–1984); N. J. Stat. Ann. § 2A:17–53 (West Supp. 1984); N. Y. Civ. Prac. Law § 5209 (McKinney 1978); N. D. Cent. Code § 32–09.1–15 (Supp. 1983); Ohio Rev. Code Ann. § 2716.21(D) (Supp. 1983); Okla. Stat., Tit. 12, § 1233 (1961); Ore. Rev. Stat. § 29.195 (1983);

ernment liable in this case would be to conclude that Congress intended to adopt a different standard for liability than would be applicable to a private employer. Such a conclusion is foreclosed by the statute and its legislative history.

Finally, the underlying purpose of § 659 is significant. The statute was enacted to remedy the plight of persons left destitute because they had no speedy and efficacious means of ensuring that their child support and alimony would be paid.[16] Burdening the garnishment process with inquiry into

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S. D. Codified Laws § 21–18–32 (1979); Tenn. Code Ann. § 29–7-117 (1980); Vt. Stat. Ann., Tit. 12, § 3081 (1973); Wash. Rev. Code § 7.33.200 (1983); W. Va. Code § 38–7-25 (1966); Wis. Stat. § 812.16(2) (1981–1982); Wyo. Stat. § 1–15–302 (1977).

[16] Senator Montoya said:

"The modification proposed by the committee provides that money due from the United States to any individual citizen, including service men and women, may be garnished as a result of legal process for payment of alimony and child support.

"What this really means is that civil servants and military personnel can be forced to accept full responsibility for care of families—especially dependent children—in the same way that other Americans can.

"It is tragic that there are any men or women in the United States who would willingly desert their children, leaving wives and families to struggle alone or to go on our already overburdened welfare rolls.

"However, as any member of the judiciary or legal profession can tell you, the truth is that there are always some who try to avoid responsibility and who must be forced to pay debts.

. . . . .

"Mr. President, the child support proposal contained in the committee substitute will give us an opportunity to prove to these women and children that justice exists for them, too, in the United States. The proposal is not new. I believe it is time for us to make sure that this small change is made in our law in order to correct what is patently a disgraceful situation. We must give the wives and children of Federal employees and retirees the same legal protections which we have provided for all other American women and children." 120 Cong. Rec. 40338–40339 (1974).

To similar effect, see S. Rep. No. 93–1356, pp. 43–44 (1974); 120 Cong. Rec. 40323 (1974) (remarks of Sen. Long); *id.*, at 41809 (remarks of Rep. Ullman). See also H. R. Rep. No. 92–481, pp. 17–18 (1971).

the state court's jurisdiction over the obligor can only frustrate this fundamental purpose as a consequence of the resulting delay in the process of collection. And "[b]ecause delay so often results in loss of substantial rights, the effect frequently will be also to make impossible the ultimate as well as the immediate collection of what is due; and to substitute a right of lifelong litigation for one of certain means of subsistence." *Griffin* v. *Griffin*, 327 U. S. 220, 239, n. 4 (1946) (Rutledge, J., dissenting in part). Such a result could not be more at odds with congressional intent.

IV

As part of the 1977 amendment, Congress authorized the promulgation of "regulations for the implementation of the provisions of section 659," 42 U. S. C. § 661(a). In the last sentence of § 659(f), Congress indicated that the United States could not be held liable for honoring a writ of garnishment so long as payment is made in accordance with these regulations. Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.[17] Moreover, implementing regulations which simplify a disbursing officer's task in deciding whether to honor a writ of garnishment are entitled to special deference, since that was the precise objective of Congress when it delegated authority to issue regulations.[18]

The relevant regulations squarely address the question presented by this case. The regulations require that within 15 days of the service of process, the garnishee must give notice of service and a copy of the process to the employee. 5 CFR § 581.302(a) (1984). The regulations further provide that the garnishee entity must honor the process except in specified situations, none of which involves the issuing court's lack of jurisdiction over the employee.[19] They then state:

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[17] See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 44 (1981); *Batterton* v. *Francis*, 432 U. S. 416, 425–426 (1977).

[18] See 123 Cong. Rec. 12912–12913 (1977); S. Rep. No. 94–1350, p. 6 (1976).

> "If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor." § 581.305(f).[20]

Thus, the regulations definitively resolve the question before us.[21] They cannot possibly be considered "clearly inconsistent" with the statute or "arbitrary," since the terms "legal process" and "court of competent jurisdiction" are at least ambiguous,[22] and they further congressional intent to facilitate speedy enforcement of garnishment orders and to minimize the burden on the Government.

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[19] The regulations provide:

"The governmental entity shall comply with legal process, except where the process cannot be complied with because:

"(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

"(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

"(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

"(4) It does not comply with the mandatory provisions of this part;

"(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

"(6) Where notice is received that the obligor has appealed either the legal process or the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by the court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending. Where the legal process has been issued by a court in the District of Columbia, a motion to quash shall be deemed equivalent to an appeal." 5 CFR § 581.305(a) (1984).

[20] See also 48 Fed. Reg. 811, 26279 (1983).

[21] Respondent argues that § 581.305(f) is not entitled to deference because it was not promulgated by the Office of Personnel Management until after this suit was brought. But that fact is of no consequence. Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise

V

The plain language of the statute, its legislative history and underlying purposes, as well as the explicit regulations authorized by the statute itself, all indicate that the Government cannot be held liable for honoring a writ of garnishment which is "regular on its face" and has been issued by a court with subject-matter jurisdiction to issue such orders. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

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be apparent. Thus, assuming the promulgation of § 581.305(f) was a response to this suit, that demonstrates only that the suit brought to light an additional administrative problem of the type that Congress thought should be addressed by regulation. When OPM responded to this problem by issuing regulations it was doing no more than the task which Congress had assigned it. See generally *Anderson, Clayton & Co.* v. *United States*, 562 F. 2d 972, 979–985 (CA5 1977), cert. denied, 436 U. S. 944 (1978).

[22] See *supra*, at 828.

CHEVRON U. S. A. INC. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82–1005. Argued February 29, 1984—Decided June 25, 1984*

The Clean Air Act Amendments of 1977 impose certain requirements on States that have not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation, including the requirement that such "nonattainment" States establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for such sources unless stringent conditions are met. EPA regulations promulgated in 1981 to implement the permit requirement allow a State to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant, thus allowing a State to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." Respondents filed a petition for review in the Court of Appeals, which set aside the regulations embodying the "bubble concept" as contrary to law. Although recognizing that the amended Clean Air Act does not explicitly define what Congress envisioned as a "stationary source" to which the permit program should apply, and that the issue was not squarely addressed in the legislative history, the court concluded that, in view of the purpose of the nonattainment program to improve rather than merely maintain air quality, a plantwide definition was "inappropriate," while stating it was mandatory in programs designed to maintain existing air quality.

Held: The EPA's plantwide definition is a permissible construction of the statutory term "stationary source." Pp. 842–866.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the

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*Together with No. 82–1247, *American Iron & Steel Institute et al.* v. *Natural Resources Defense Council, Inc., et al.;* and No. 82–1591, *Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, also on certiorari to the same court.

agency's answer is based on a permissible construction of the statute. Pp. 842–845.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 845–851.

(c) The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas plainly discloses that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Pp. 851–853.

(d) Prior to the 1977 Amendments, the EPA had used a plantwide definition of the term "source," but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the "bubble concept" in nonattainment States' programs designed to enhance air quality. However, when a new administration took office in 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the plantwide definition in nonattainment areas. Pp. 853–859.

(e) Parsing the general terms in the text of the amended Clean Air Act—particularly the provisions of §§ 302(j) and 111(a)(3) pertaining to the definition of "source"—does not reveal any actual intent of Congress as to the issue in these cases. To the extent any congressional "intent" can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act. Similarly, the legislative history is consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments. The plantwide definition is fully consistent with the policy of allowing reasonable economic growth, and the EPA has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well. The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference. Pp. 859–866.

222 U. S. App. D. C. 268, 685 F. 2d 718, reversed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL and REHNQUIST, JJ., who took no part in the consideration or decision of the cases, and O'CONNOR, J., who took no part in the decision of the cases.

Deputy Solicitor General Bator argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82–1591 were *Solicitor General Lee, Acting Assistant Attorney General Habicht, Deputy Assistant Attorney General Walker, Mark I. Levy, Anne S. Almy, William F. Pedersen,* and *Charles S. Carter. Michael H. Salinsky* and *Kevin M. Fong* filed briefs for petitioner in No. 82–1005. *Robert A. Emmett, David Ferber, Stark Ritchie, Theodore L. Garrett, Patricia A. Barald, Louis E. Tosi, William L. Patberg, Charles F. Lettow,* and *Barton C. Green* filed briefs for petitioners in No. 82–1247.

David D. Doniger argued the cause and filed a brief for respondents.†

JUSTICE STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 685, Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met.[1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

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†Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *John A. Myler;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann P. Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Thomas Y. Au, Duane Woodard,* Attorney General of Colorado, *Richard L. Griffith,* Assistant Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *Robert A. Whitehead, Jr.,* Assistant Attorney General, *James S. Tierney,* Attorney General of Maine, *Robert Abrams,* Attorney General of New York, *Marcia J. Cleveland* and *Mary L. Lyndon,* Assistant Attorneys General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *John J. Easton, Jr.,* Attorney General of Vermont, *Merideth Wright,* Assistant Attorney General, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Maryann Sumi,* Assistant Attorney General.

James D. English, Mary-Win O'Brien, and *Bernard Kleiman* filed a brief for the United Steelworkers of America, AFL–CIO–CLC, as *amicus curiae.*

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October

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[1] Section 172(b)(6), 42 U. S. C. § 7502(b)(6), provides:

"The plan provisions required by subsection (a) shall—

. . . . .

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

[2] "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

14, 1981. 46 Fed. Reg. 50766. Respondents[3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U. S. C. § 7607(b)(1).[4] The Court of Appeals set aside the regulations. *National Resources Defense Council, Inc.* v. *Gorsuch*, 222 U. S. App. D. C. 268, 685 F. 2d 718 (1982).

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." *Id.*, at 273, 685 F. 2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." *Id.*, at 276, n. 39, 685 F. 2d, at 726, n. 39.[5] Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs,[6] the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. *Id.*, at 276, 685 F. 2d, at 726. Since the purpose of the permit program—its "*raison d'être*," in the court's view—was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. *Ibid.* It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U. S. 956 (1983), and we now reverse.

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[3] National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

[4] Petitioners, Chevron U. S. A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

[5] The court remarked in this regard:

"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U. S. App. D. C., at 276, n. 39, 685 F. 2d, at 726, n. 39.

[6] *Alabama Power Co.* v. *Costle*, 204 U. S. App. D. C. 51, 636 F. 2d 323 (1979); *ASARCO Inc.* v. *EPA*, 188 U. S. App. D. C. 77, 578 F. 2d 319 (1978).

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions,[8] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

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[7] Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941); *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1940); *Langnes* v. *Green*, 282 U. S. 531, 533–539 (1931).

[8] *E. g., Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956); *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59 (1940); *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827); *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[12] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provison for a reasonable interpretation made by the administrator of an agency.[13]

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[9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, *e. g.*, *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 32 (1981); *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745–746 (1973); *Volkswagenwerk* v. *FMC*, 390 U. S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *Webster* v. *Luther*, 163 U. S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

[10] See generally, R. Pound, The Spirit of the Common Law 174–175 (1921).

[11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S., at 39; *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 75 (1975); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946); *McLaren* v. *Fleischer*, 256 U. S. 477, 480–481 (1921).

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,[14] and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g., National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Republic Aviation Corp.* v.

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[12] See, *e. g., United States* v. *Morton, ante*, at 834; *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 44 (1981); *Batterton* v. *Francis*, 432 U. S. 416, 424–426 (1977); *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 235–237 (1936).

[13] *E. g., INS* v. *Jong Ha Wang*, 450 U. S. 139, 144 (1981); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S., at 87.

[14] *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist., ante*, at 389; *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982); *Union Electric Co.* v. *EPA*, 427 U. S. 246, 256 (1976); *Investment Company Institute* v. *Camp*, 401 U. S. 617, 626–627 (1971); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S., at 153–154; *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944); *McLaren* v. *Fleischer*, 256 U. S., at 480–481; *Webster* v. *Luther*, 163 U. S., at 342; *Brown* v. *United States*, 113 U. S. 568, 570–571 (1885); *United States* v. *Moore*, 95 U. S. 760, 763 (1878); *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827).

> *Labor Board*, 324 U. S. 793; *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194; *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344.
>
> ". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U. S. 374, 382, 383 (1961).

Accord, *Capital Cities Cable, Inc.* v. *Crisp*, *ante*, at 699–700.

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 63–64 (1975). The Clean Air Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," 421 U. S., at 64, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's)[15] and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

> "For purposes of this section:
>
> . . . . .
>
> "(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.[16]

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant.[17]

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[15] Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

[16] See §§ 110(a)(2)(D) and 110(a)(4).

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained.[18] In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus.[19]

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed. Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." *Id.*, at 55524–55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." *Id.*, at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals.[20] Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See *Ibid.* The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept."[21]

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[17] The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see *ASARCO Inc.*, 188 U. S. App. D. C., at 83–84, 578 F. 2d, at 325–327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

[18] See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3–20 through 3.3–33 (1981).

[19] Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong. Rec. 34375–34403, 34405–34418 (1976).

IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute—91 Stat.

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[20] For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed. Reg. 55527 (1976).

[21] In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:

"A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276.

745–751 (Part D of Title I of the amended Act, 42 U. S. C. §§ 7501–7508)—expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments.[22]

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible.[23]

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[22] Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U. S. C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U. S. C. § 7503(2), is not at issue.

[23] Thus, among other requirements, § 172(b) provided that the SIP's shall—

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; . . .

. . . . .

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial

Most significantly for our purposes, the statute provided that each plan shall

> "(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 . . . ." *Id.*, at 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER).[24]

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reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." *Id.*, at 746.

[24] Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects—

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

"In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

> "(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

> "Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow

> States greater flexibility for the former purpose than EPA's present interpretative regulations afford.
>
> "The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.
>
> "The State's second option would be to revise its implementation plan in accordance with this new provision." H. R. Rep. No. 95-294, p. 211 (1977).[25]

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." *Ibid.* This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

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[25] During the floor debates Congressman Waxman remarked that the legislation struck

> "a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised. . . .
>
> "This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong. Rec. 27076 (1977).

The second "main purpose" of the provision—allowing the States "greater flexibility" than the EPA's interpretative Ruling—as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

Senator Muskie made the following remarks:

> "I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant—or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.
>
> "A source—including an existing facility ordered to convert to coal—is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong. Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed. Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

> "Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." *Ibid.*[26]

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[26] In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 F R 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed. Reg. 3277 (1979).

In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See *id.*, at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:

> "'*Bubble' Exemption:* The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:
>
> "i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.
>
> "ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment."[27]

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[27] *Id.*, at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. *See* 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new contruction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." *Id.*, at 51933.

Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

> "Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." *Id.*, at 51925.[28]

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

> "In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:
>
> "(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plantwide bubble.
>
> "(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.
>
> "In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR

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[28] In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." *Id.*, at 51932.

regardless of whether they are within a major plant." *Id.*, at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases,[29] EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed. Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed. Reg. 16281. In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

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[29] "The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute. . . .

"Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. . . .

. . . . .

"Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed. Reg. 52697 (1980).

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." *Ibid.* It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." *Ibid.* Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." *Ibid.* Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible.[30] These conclusions were ex-

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[30] It stated:

"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a pressed in a proposed rulemaking in August 1981 that was formally promulgated in October. See *id.*, at 50766.

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute.[31]

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See *supra*, at 846. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this defi-

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significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed. Reg. 16281 (1981).

[31] "What EPA may not do, however, is define all four terms to mean *only* plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

nition applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See *supra*, at 851. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means—a source must emit at least 100 tons of pollution to qualify—but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility—a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute.[32] As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant.[33] A "word may have a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519

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[32] We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

[33] Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

(1923). On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms—a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.[34]

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[34] The argument based on the text of § 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement—the "offset condition"—the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits—the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire . . . ." *Jewell Ridge Coal Corp.* v. *Mine Workers*, 325 U. S. 161, 168–169 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement.[35] But the full statement is ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

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[35] See *supra*, at 853. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See *ibid.*

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See *supra*, at 857–859, and n. 29; see also *supra*, at 855, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process,[36] as well as by certain private studies.[37]

Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

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[36] See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up. . . ." App. 128–129.

[37] "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. . . . [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning the Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.[38]

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[38] Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less—but still more than 100 tons—the result should be no different simply because "it happens to be built not at a new site, but within a *pre-existing plant.*" Brief for Respondents 4.

In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex,[39] the agency considered the matter in a detailed and reasoned fashion,[40] and the decision involves reconciling conflicting policies.[41] Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

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[39] See, *e. g., Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist., ante,* at 390.

[40] See *SEC* v. *Sloan,* 436 U. S., at 117; *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 287, n. 5 (1978); *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944).

[41] See *Capital Cities Cable, Inc.* v. *Crisp, ante,* at 699–700; *United States* v. *Shimer,* 367 U. S. 374, 382 (1961).

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill*, 437 U. S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Adminstrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends . . . ." *United States* v. *Shimer*, 367 U. S., at 383.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL and JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

JUSTICE O'CONNOR took no part in the decision of these cases.

COOPER ET AL. *v.* FEDERAL RESERVE BANK OF RICHMOND

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-185. Argued March 19, 1984—Decided June 25, 1984

The Equal Employment Opportunity Commission brought an action in Federal District Court against respondent Federal Reserve Bank, alleging that one of respondent's branches (the Bank) violated § 703(a) of Title VII of the Civil Rights Act of 1964 by engaging in employment discrimination based on race during a specified time period. Subsequently, four of the Bank's employees (the Cooper petitioners) were allowed to intervene as plaintiffs, and they alleged that the Bank's employment practices violated 42 U. S. C. § 1981, as well as Title VII, and that they could adequately represent a class of black employees against whom the Bank had discriminated. The District Court then certified the class pursuant to Federal Rules of Civil Procedure 23(b)(2) and (3), and ordered that notice be given to the class members. Among the recipients of the notice were the Baxter petitioners. At the trial both the Cooper petitioners and the Baxter petitioners testified, and the District Court held that the Bank had engaged in a pattern and practice of racial discrimination with respect to employees in certain specified pay grades but not with respect to employees above those grades, and found that the Bank had discriminated against two of the Cooper petitioners but not against the others. Thereafter, the Baxter petitioners moved to intervene, but the District Court denied the motion on the ground, as to one petitioner, that since she was a member of the class to which relief had been ordered, her rights would be protected in the later relief stage of the proceedings, and, as to the other petitioners, on the ground that they were employed in jobs above the specified grades for which relief would be granted. These latter Baxter petitioners then filed a separate action against the Bank in the District Court, alleging that each of them had been denied a promotion because of their race in violation of 42 U. S. C. § 1981. The District Court denied the Bank's motion to dismiss but certified its order for interlocutory appeal, which was then consolidated with the Bank's pending appeal in the class action. The Court of Appeals reversed on the merits in the class action, holding that there was insufficient evidence to establish a pattern or practice of racial discrimination in the specified grades, and that none of the Cooper petitioners had been discriminated against. The court further held that, under the doctrine of res judicata, the judgment in the class action precluded the Baxter petitioners from maintaining their individual claims against the Bank.

Held: The Baxter petitioners are not precluded from maintaining their separate action against the Bank. While the Court of Appeals was correct in generally concluding that the Baxter petitioners, as members of the class represented in the class action, were bound by the adverse judgment in that action, the court erred on the preclusive effect it attached to that judgment. The judgment bars the class members from bringing another class action against the Bank alleging a pattern or practice of racial discrimination for the same time period and precludes the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in such a pattern or practice of racial discrimination during that same time period. But the judgment is not dispositive of the individual claims of the Baxter petitioners. Assuming that they establish a prima facie case of discrimination, the Bank will be required to articulate a legitimate reason for each of the challenged employment decisions, and, if it meets that burden, the ultimate question regarding motivation in the Baxter petitioners' individual cases will be resolved by the District Court. Permitting the Baxter petitioners to bring a separate action will not frustrate the purposes of Rule 23. To deny such permission would be tantamount to requiring that every class member be permitted to intervene to litigate the merits of his individual claim. Moreover, whether the issues framed by the named parties should be expanded to encompass the individual claims of additional class members is a matter that should be decided in the first instance by the District Court. Nothing in Rule 23 requires that the District Court make a finding with respect to each and every matter on which there is testimony in a class action. Rule 23's purpose in providing a mechanism for the expeditious decision of *common* questions might be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant. Pp. 874–881.

698 F. 2d 633, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the judgment. POWELL, J., took no part in the decision of the case.

Eric Schnapper argued the cause for petitioners. With him on the briefs were *John T. Nockleby*, *Jack Greenberg*, *O. Peter Sherwood*, and *Charles Stephen Ralston*.

Harriet S. Shapiro argued the cause for the United States et al. as *amici curiae* urging reversal. With her on the brief were *Solicitor General Lee, Deputy Solicitor General Wallace, Philip B. Sklover,* and *Vella M. Fink.*

George R. Hodges argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

The question to be decided is whether a judgment in a class action determining that an employer did not engage in a general pattern or practice of racial discrimination against the certified class of employees precludes a class member from maintaining a subsequent civil action alleging an individual claim of racial discrimination against the employer.

I

On March 22, 1977, the Equal Employment Opportunity Commission commenced a civil action against respondent, the Federal Reserve Bank of Richmond.[1] Respondent operates a branch in Charlotte, N. C. (the Bank), where during the years 1974–1978 it employed about 350–450 employees in several departments. The EEOC complaint alleged that the Bank was violating § 703(a) of Title VII of the Civil Rights Act of 1964 by engaging in "policies and practices" that included "failing and refusing to promote *blacks* because of race." App. 9a.

Six months after the EEOC filed its complaint, four individual employees[2] were allowed to intervene as plaintiffs. In

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*Briefs of *amici curiae* urging affirmance were filed for Boeing Co. by *Jerome A. Hoffman, John M. Coleman,* and *Michael C. Hallerud;* and for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Stephen C. Yohay.*

[1] The Bank is organized pursuant to a federal statute, 12 U. S. C. § 341, that enables it to sue and be sued, to appoint its own employees, and to define their duties.

[2] Sylvia Cooper, Constance Russell, Helen Moore, and Elmore Hannah, Jr., sometimes referred to by the District Court as the "intervening plain-

their "complaint in intervention," these plaintiffs alleged that the Bank's employment practices violated 42 U. S. C. § 1981, as well as Title VII; that each of them was the victim of employment discrimination based on race; and that they could adequately represent a class of black employees against whom the Bank had discriminated because of their race. In due course, the District Court entered an order conditionally certifying the following class pursuant to Federal Rules of Civil Procedure 23(b)(2) and (3):

> "All black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 [6 months prior to the first charge filed by the intervenors with EEOC], who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race."[3]

After certifying the class, the District Court ordered that notice be published in the Charlotte newspapers and mailed to each individual member of the class. The notice described the status of the litigation, and plainly stated that members of the class "will be bound by the judgment or other determination" if they did not exclude themselves by sending a written notice to the Clerk.[4] Among the recipients of the

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tiffs" and by the parties as the "Cooper petitioners." In our order granting certiorari, we declined to review two questions that were presented by these parties. 464 U. S. 932 (1983).

[3] App. to Pet. for Cert. 200a (brackets in original). Certification was also sought for a class of female employees, but the District Court concluded that the evidence did not warrant the certification of a class with respect to the claims of sex discrimination. *Id.*, at 200a, n. 1.

[4] The actual text of the critical paragraphs of the notice read as follows:

"3. The class of persons who are entitled to participate in this action as members of the class represented by the plaintiff-intervenors, for whom relief may be sought in this action by the plaintiff-intervenors and who will be bound by the determination in this action is defined to include: all black notice were Phyllis Baxter and five other individuals employed by the Bank.[5] It is undisputed that these individuals—the Baxter petitioners—are members of the class represented by the intervening plaintiffs and that they made no attempt to exclude themselves from the class.

At the trial the intervening plaintiffs, as well as the Baxter petitioners, testified. The District Court found that the Bank had engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to

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persons who were employed by the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any time since January 3, 1974.

"4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment that you may have against the defendant. You need to do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

"5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.

"6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims you may have against the defendant. You may exclude yourself from this action by notifying the Clerk in writing that you do not desire to participate in this action. The Clerk's address is: Clerk, United States District Court, Post Office Box 1266, Charlotte, North Carolina 28232." App. 35a–37a.

[5] In addition to Baxter, they were Brenda Gilliam, Glenda Knott, Emma Ruffin, Alfred Harrison, and Sherri McCorkle. All of these individuals, sometimes referred to as the "Baxter petitioners," stipulated that they received the notice. See *id.*, at 95a.

opportunities afforded white employees in pay grades 4 and 5. Except as so specified, however, the District Court found that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." App. to Pet. for Cert. 193a–194a. With respect to the claims of the four intervening plaintiffs, the court found that the Bank had discriminated against Cooper and Russell, but not against Moore and Hannah. Finally, the court somewhat cryptically stated that although it had an opinion about "the entitlement to relief of some of the class members who testified at trial," it would defer decision of such matters to a further proceeding. *Id.*, at 194a.

Thereafter, on March 24, 1981, the Baxter petitioners moved to intervene, alleging that each had been denied a promotion for discriminatory reasons. With respect to Emma Ruffin, the court denied the motion because she was a member of the class for which relief had been ordered and therefore her rights would be protected in the Stage II proceedings to be held on the question of relief. With respect to the other five Baxter petitioners, the court also denied the motion, but for a different reason. It held that because all of them were employed in jobs above the grade 5 category, they were not entitled to any benefit from the court's ruling with respect to discrimination in grades 4 and 5. The District Court stated: "The court has found no proof of any classwide discrimination above grade 5 and, therefore, they are not entitled to participate in any Stage II proceedings in this case." *Id.*, at 287a. The court added that it could "see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week . . . ." *Id.*, at 288a.

A few days later the Baxter petitioners filed a separate action against the Bank alleging that each of them had been denied a promotion because of their race in violation of 42 U. S. C. § 1981. The Bank moved to dismiss the complaint on the ground that each of them was a member of the class that had been certified in the Cooper litigation, that each was employed in a grade other than 4 or 5, and that they were bound by the determination that there was no proof of any classwide discrimination above grade 5. The District Court denied the motion to dismiss, but certified its order for interlocutory appeal under 28 U. S. C. § 1292(b). The Bank's interlocutory appeal from the order was then consolidated with the Bank's pending appeal in the Cooper litigation.

The United States Court of Appeals for the Fourth Circuit reversed the District Court's judgment on the merits in the Cooper litigation, concluding that (1) there was insufficient evidence to establish a pattern or practice of racial discrimination in grades 4 and 5, and (2) two of the intervening plaintiffs had not been discriminated against on account of race. *EEOC* v. *Federal Reserve Bank of Richmond*, 698 F. 2d 633 (1983). The court further held that under the doctrine of res judicata, the judgment in the Cooper class action precluded the Baxter petitioners from maintaining their individual race discrimination claims against the Bank. The court thus reversed the order denying the Bank's motion to dismiss in the Baxter action, and remanded for dismissal of the Baxter complaint. We granted certiorari to review that judgment, 464 U. S. 932 (1983),[6] and we now reverse.

II

Claims of two types were adjudicated in the Cooper litigation. First, the individual claims of each of the four intervening plaintiffs have been finally decided in the Bank's favor.[7] Those individual decisions do not, of course, foreclose any other individual claims. Second, the class claim that the Bank followed "policies and practices" of discriminating against its employees has also been decided.[8] It is that decision on which the Court of Appeals based its res judicata analysis.

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[6] As noted, n. 2, *supra*, our limited grant of certiorari does not encompass the questions raised by the Cooper petitioners concerning the Court of Appeals' disposition of the merits of their case.

[7] Two of those claims were rejected by the District Court and two by the Court of Appeals; all four of those determinations are now equally final.

There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. See, *e. g.*, *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921); Restatement of Judgments § 86 (1942); Restatement (Second) of Judgments § 41(1)(e) (1982); see also Fed. Rule Civ. Proc. 23(c)(3); see generally Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. L. Rev. 555 (1938). Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.

III

A plaintiff bringing a civil action for a violation of § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a), has the initial burden of establishing a prima facie case that his employer discriminated against him on account of his race, color, religion, sex, or national origin. A plaintiff meets this initial burden by offering evidence adequate to create an inference that he was denied an employment opportunity on the basis of a discriminatory criterion enumerated in Title VII.

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[8] The District Court rejected all of the class claims except that pertaining to grades 4 and 5; the claim on behalf of that subclass was rejected by the Court of Appeals. Again, that distinction between subclasses is no longer significant for the entire class claim has now been decided.

A plaintiff alleging one instance of discrimination establishes a prima facie case justifying an inference of individual racial discrimination by showing that he (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973). Once these facts are established, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981). At that point, the presumption of discrimination "drops from the case," *id.*, at 255, n. 10, and the district court is in a position to decide the ultimate question in such a suit: whether the particular employment decision at issue was made on the basis of race. *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711, 714–715 (1983); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 253. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision "remains at all times with the plaintiff," *ibid.*, and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S., at 716.

In *Franks* v. *Bowman Transportation Co*, 424 U. S. 747 (1976), the plaintiff, on behalf of himself and all others similarly situated, alleged that the employer had engaged in a pervasive pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees. In that class action we held that demonstrating the existence of a discriminatory pattern or practice established a presumption that the individual class members had been discriminated against on account of race. *Id.*, at 772. Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination; rather it must be established by a preponderance of the evidence that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters* v. *United States*, 431 U. S. 324, 336 (1977) (footnote omitted).[9] While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class. *Id.*, at 361.

The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." *Id.*, at 360, n. 46. See generally *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 575, n. 7 (1978).

This distinction was critical to our holding in *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982), that an individual employee's claim that he was denied a promotion on racial grounds did not necessarily make him an adequate representative of a class composed of persons who had allegedly been refused employment for discriminatory reasons. We explained:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have

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[9] Although *Teamsters* involved an action litigated on the merits by the Government as plaintiff under § 707(a) of the Act, it is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action. See *Teamsters* v. *United States*, 431 U. S., at 358–360.

> suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices." *Id.*, at 157–158.

After analyzing the particulars of the plaintiff's claim in that case, we pointed out that if "one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." *Id.*, at 159. We further observed:

> "In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Id.*, at 159, n. 15.

Falcon thus holds that the existence of a valid individual claim does not necessarily warrant the conclusion that the individual plaintiff may successfully maintain a class action. It is equally clear that a class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved. The facts of this case illustrate the point.

The District Court found that two of the intervening plaintiffs, Cooper and Russell, had both established that they were the victims of racial discrimination but, as the Court of Appeals noted, they were employed in grades higher than grade 5 and therefore their testimony provided no support for the conclusion that there was a practice of discrimination in grades 4 and 5.[10] Given the burden of establishing a prima facie case of a pattern or practice of discrimination, it was entirely consistent for the District Court simultaneously to conclude that Cooper and Russell had valid individual claims even though it had expressly found no proof of any classwide discrimination above grade 5. It could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim. "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U. S., at 579.

The analysis of the merits of the Cooper litigation by the Court of Appeals is entirely consistent with this conclusion. In essence, the Court of Appeals held that the statistical evidence, buttressed by expert testimony and anecdotal evidence by three individual employees in grades 4 and 5, was not sufficient to support the finding of a pattern of bankwide discrimination within those grades. It is true that the Court of Appeals was unpersuaded by the anecdotal evidence; it is equally clear, however, that it did not regard two or three instances of discrimination as sufficient to establish a general policy.[11] It quite properly recognized that a "court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 934 (1982). Conversely, a piece of fruit may well be bruised without being rotten to the core.

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[10] The Court of Appeals wrote:

"In denying the motion the District Court stated that all intervenors 'in grades higher than grade 5' were not members of the class in whose favor the District Court had found 'classwide discrimination.' By this test, Cooper, Moore, Russell, Baxter, Gilliam, Knott and McCorkle were not members of the class in which discrimination was found and their testimony could not have been included within the District Court's term 'oral testimony of class members,' complaining of promotion out of either pay grade 4 or pay grade 5; only the testimony of Ruffin and Harrison met that qualifying standard." *EEOC* v. *Federal Reserve Bank of Richmond*, 698 F. 2d 633, 644 (1983).

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[11] It wrote:

"The claim here is a pattern or practice of intentional discrimination against an entire group by treating it less favorably because of race. That is the typical disparate treatment case. This case should accordingly be properly treated as such. However, the result reached by us would not be substantially different whether the class action be considered as a disparate impact or a disparate treatment case." *Id.*, at 639.

"This case accordingly presents quite a contrast with *Teamsters* where the 'oral testimony of class members' demonstrated 40 cases of specific instances of discrimination in support of the statistical evidence offered by plaintiffs or with that in our own case of *Chisholm* v. *United States Postal Service*, 665 F. 2d 482, 495 (4th Cir. 1981), where there were 20 'class members' testifying of individual discrimination. Here all we have is the testimony of but two class members testifying of individual discrimination in promotion out of either pay grade 4 or pay grade 5 on which a finding of discriminatory practices can be rested. This is even less of a presentation of oral testimony in support of a pattern of discrimination than that found wanting in *Ste. Marie* v. *Eastern R. Ass'n.*, 650 F. 2d 395, 405–06 (2d Cir. 1981), where the Court declared that the small number of incidents of discrimination in promotion over a period of years in that case 'would be insufficient to support the inference of a routine or regular practice of discrimination . . . ,' or, in *Goff* v. *Continental Oil Co.*, 678 F. 2d 593, 597 (5th Cir. 1982), where the Court held that 'even if all three witnesses' accounts of racial discrimination were true, this evidence would not have been enough to prove a pattern or practice of company-wide discrimination by Conoco.' It follows that these two incidents of failure to promote Ruffin or Harrison, even if regarded as discriminatory, (which we assume only *arguendo*), would not support the District Court's finding of a pattern of class discrimination in promotions out of grades 4 and 5." *Id.*, at 643–644 (footnotes omitted).

The Court of Appeals was correct in generally concluding that the Baxter petitioners, as members of the class represented by the intervening plaintiffs in the Cooper litigation, are bound by the adverse judgment in that case. The court erred, however, in the preclusive effect it attached to that prior adjudication. That judgment (1) bars the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of the individual claims the Baxter petitioners have alleged in their separate action. Assuming they establish a prima facie case of discrimination under *McDonnell Douglas*, the Bank will be required to articulate a legitimate reason for each of the challenged decisions, and if it meets that burden, the ultimate questions regarding motivation in their individual cases will be resolved by the District Court. Moreover, the prior adjudication may well prove beneficial to the Bank in the Baxter action: the determination in the Cooper action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext. See *McDonnell Douglas*, 411 U. S., at 804–805.

The Bank argues that permitting the Baxter petitioners to bring separate actions would frustrate the purposes of Rule 23. We think the converse is true. The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the Bank's theory were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.

It is also suggested that the District Court had a duty to decide the merits of the individual claims of class members, at least insofar as the individual claimants became witnesses in the joint proceeding and subjected their individual employment histories to scrutiny at trial.[12] Unless these claims are decided in the main proceeding, the Bank argues that the duplicative litigation that Rule 23 was designed to avoid will be encouraged, and that defendants will be subjected to the risks of liability without the offsetting benefit of a favorable termination of exposure through a final judgment.

This argument fails to differentiate between what the District Court might have done and what it actually did. The District Court did actually adjudicate the individual claims of Cooper and the other intervening plaintiffs, as well as the class claims, but it pointedly refused to decide the individual claims of the Baxter petitioners. Whether the issues framed by the named parties before the court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the District Court. Nothing in Rule 23 requires as a matter of law that the District Court make a finding with respect to each and every matter on which there is testimony in the class action. Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of *common* questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant. We do not find the District Court's denial of the Baxter petitioners' motion for leave to intervene in the Cooper litigation, or its decision not to make findings regarding the Baxter petitioners' testimony in the Cooper litigation, to be inconsistent with Rule 23.

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[12] We find the Bank's contention that the District Court actually found against the Baxter petitioners on the basis of the testimony in the Cooper action wholly without merit.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE POWELL took no part in the decision of this case.

SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82–945. Argued December 6, 1983—Decided June 25, 1984

A certain union was elected as the collective-bargaining representative of employees of petitioners, two small firms that constitute a single integrated employer for purposes of the National Labor Relations Act (NLRA). Petitioners then filed objections to the election with the National Labor Relations Board (Board), asserting that six of the seven eligible voters were illegal aliens. After being notified that their objections were overruled, petitioners' president sent a letter to the Immigration and Naturalization Service (INS) asking that it check into the status of a number of petitioners' employees. As a result of the INS's investigation, five employees voluntarily left the country to avoid deportation. Subsequently, the Board held that petitioners had committed an unfair labor practice, in violation of § 8(a)(3) of the NLRA, by reporting their employees, known to be undocumented aliens, to the INS in retaliation for the employees' union activities. Concluding that petitioners' conduct constituted a "constructive discharge" of the employees, the Board entered a cease-and-desist order, and directed the "conventional remedy of reinstatement with backpay," thereby leaving until subsequent compliance proceedings the determination whether the employees had in fact been available for work so as not to toll petitioners' backpay liability. On appeal, the Court of Appeals enforced the Board's order as modified by the court to require that petitioners' reinstatement offers to the employees be left open for a period of four years to allow them a reasonable time to make arrangements for legal reentry, and that the offers be written in Spanish and delivered so as to allow for verification of receipt. Although recognizing that the employees would not be entitled to backpay for the period when they were not legally entitled to be present and employed in the United States, the court decided that it would serve the NLRA's policies to set a minimum amount of backpay that petitioners must pay in any event, and suggested that the Board consider whether six months' backpay would be an appropriate amount. The Board accepted the suggestion, and its final order approved by the court included the minimum award of six months' backpay.

Held:

1. The Board's interpretation of the NLRA as applying to unfair labor practices committed against undocumented aliens is reasonable and thus will be upheld. Pp. 891–894.

(a) The NLRA's terms—defining "employee" to include "any employee," and not listing undocumented aliens among the few groups of specifically exempted workers—fully support the Board's interpretation. Similarly, extending the NLRA's coverage to undocumented aliens is consistent with its purpose of encouraging and protecting the collective-bargaining process. Pp. 891–892.

(b) There is no conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA), which does not make the employment relationship between an employer and an undocumented alien unlawful. Enforcement of the NLRA with respect to undocumented alien employees is compatible with the INA's purpose in restricting immigration so as to preserve jobs for American workers, since if there is no advantage as to wages and employment conditions in preferring illegal alien workers, any incentive for employers to hire illegal aliens is lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. Pp. 892–894.

2. The Court of Appeals properly held that petitioners committed an unfair labor practice under § 8(a)(3) of the NLRA by constructively discharging their undocumented alien employees through reporting the employees to the INS in retaliation for participating in union activities. There is no merit in petitioners' contention that although they acted with "anti-union animus," nevertheless their conduct did not force the undocumented alien workers' departure from the country, and that the employees' status as illegal aliens instead was the "proximate cause" of their departure. The evidence showed that the letter of petitioners' president to the INS was the sole cause of the investigation that resulted in the employees' departure, and that the president foresaw precisely this result. Although the reporting of any violation of the criminal laws ordinarily should be encouraged, not penalized, the Board's view that § 8(a)(3) is violated only when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee's protected union activity, is consistent with the policies of both the INA and the NLRA. Nor is there merit in petitioners' claim that their request for enforcement of the federal immigration laws was an aspect of their First Amendment right "to petition the Government for a redress of grievances" and therefore could not be burdened under the guise of enforcing the NLRA. *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, distinguished. Pp. 894–898.

3. The Court of Appeals erred in its modification of the Board's remedial order. Pp. 898–906.

(a) By directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work, the court exceeded its limited authority of review under the NLRA, and also effectively compelled the Board to take action that does not lie within the Board's powers. A backpay remedy must be tailored to expunge only *actual*, not *speculative*, consequences of an unfair labor practice. The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws cannot justify the judicial arrogation of remedial authority not fairly encompassed within the NLRA. Pp. 898–905.

(b) The Court of Appeals also exceeded its limited authority of judicial review by modifying the Board's order so as to require petitioners to draft the reinstatement offers in Spanish and to ensure verification of receipt. Such matters call for the Board's superior expertise and long experience in handling specific details of remedial relief, and if the court believed that the Board had erred in failing to impose such requirements, the appropriate course was to remand to the Board for reconsideration. The court's requirement that the reinstatement offers be held open for four years is vulnerable to similar attack. Pp. 905–906.

672 F. 2d 592, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, J., joined, in Parts I, II, and III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in Part IV of which POWELL and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 906. POWELL, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 913.

Michael R. Flaherty argued the cause for petitioners. With him on the briefs were *John A. McDonald* and *Robert A. Creamer*.

Edwin S. Kneedler argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Norton J. Come*, and *Linda Sher*.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *J. Albert Woll*, *Laurence Gold*, and *George Kaufmann;* for the Asian American Legal Defense and Education Fund et al. by *Kenneth Kimerling;* for the

JUSTICE O'CONNOR delivered the opinion of the Court.

At issue in this case are several questions arising from the application of the National Labor Relations Act (NLRA or Act) to an employer's treatment of its undocumented alien employees. We first determine whether the National Labor Relations Board (NLRB or Board) may properly find that an employer engages in an unfair labor practice by reporting to the Immigration and Naturalization Service (INS) certain employees known to be undocumented aliens in retaliation for their engaging in union activity, thereby causing their immediate departure from the United States. We then address the validity of the Board's remedial order as modified by the Court of Appeals.

I

Petitioners are two small leather processing firms located in Chicago that, for purposes of the Act, constitute a single integrated employer. In July 1976, a union organization drive was begun. Eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (Union), to act as their collective-bargaining representative. Of the 11 employees then employed by petitioners, most were Mexican nationals present illegally in the United States without visas or immigration papers authorizing them to work. The Union ultimately prevailed in a Board election conducted on December 10, 1976.

Two hours after the election, petitioners' president, John Surak, addressed a group of employees, including some of the undocumented aliens involved in this case. He asked the

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California Agricultural Labor Relations Board by *Manuel M. Medeiros*, *Nancy C. Smith*, and *Daniel G. Stone;* for the California Rural Legal Assistance Foundation by *Mary K. Gillespie;* for the Mexican American Legal Defense and Education Fund et al. by *Peter R. Taft*, *Allen M. Katz*, *Joaquin G. Avila*, *John E. Huerta*, and *Morris J. Baller;* and for the United Farm Workers of America, AFL–CIO, by *Carlos M. Alcala* and *Ira L. Gottlieb*.

employees why they had voted for the Union and cursed them for doing so. He then inquired as to whether they had valid immigration papers. Many of the employees indicated that they did not.

Petitioners filed with the Board objections to the election, arguing that six of the seven eligible voters were illegal aliens. Surak executed an accompanying affidavit which stated that he had known about the employees' illegal presence in this country for several months prior to the election. On January 19, 1977, the Board's Acting Regional Director notified petitioners that their objections were overruled and that the Union would be certified as the employees' collective-bargaining representative. The next day, Surak sent a letter to the INS asking that the agency check into the status of a number of petitioners' employees as soon as possible. In response to the letter, INS agents visited petitioners' premises on February 18, 1977, to investigate the immigration status of all Spanish-speaking employees. The INS agents discovered that five employees were living and working illegally in the United States and arrested them. Later that day, each employee executed an INS form, acknowledging illegal presence in the country and accepting INS's grant of voluntary departure as a substitute for deportation. By the end of the day, all five employees were on a bus ultimately bound for Mexico.

On February 22 and March 23, 1977, the Board's Acting Regional Director issued complaints alleging that petitioners had committed various unfair labor practices. On March 29, 1977, petitioners sent letters to the five employees who had returned to Mexico offering to reinstate them, provided that doing so would not subject Sure-Tan to any violations of United States immigration laws. The offers were to remain open until May 1, 1977.

The unfair labor practice charges were heard by an Administrative Law Judge (ALJ), whose findings and conclusions as to the merits of the complaints were affirmed and adopted by the Board. Specifically, the Board affirmed the ALJ's conclusion that petitioners had violated §§ 8(a)(1) and (3)[1] by requesting the INS to investigate the status of their Mexican employees "solely because the employees supported the Union" and "with full knowledge that the employees in question had no papers or work permits." *Sure-Tan, Inc.*, 234 N. L. R. B. 1187 (1978). The Board, therefore, agreed with the ALJ's finding that "the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by [petitioners] and constitutes a constructive discharge." *Id.*, at 1191.[2]

As a remedy for the § 8(a)(3) violations, the Board adopted the ALJ's recommendation that petitioners be ordered to cease and desist from their various unfair labor practices, including notifying the INS of their employees' status because of the employees' support of the Union. However, the Board declined to adopt the ALJ's specific recommendations as to the appropriate remedy. The ALJ had recommended that petitioners be ordered to offer the discharged employees reinstatement and that the offers be held open for six months. In addition, the ALJ had concluded that since, under past Board precedent, backpay is normally tolled during those periods in which employees are not available for employment, an ordinary backpay award could not be ordered in this case. Nevertheless, the ALJ had invited the Board to consider awarding backpay for a minimum 4-week period both to provide some measure of relief to the illegally discharged employees and to deter future violations of the NLRA.

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[1] Sections 8(a)(1) and (3) of the Act, 61 Stat. 140, as amended, 29 U. S. C. §§ 158(a)(1) and (3), make it an "unfair labor practice" for an employer "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title" or "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 7 grants employees the rights of self-organization, participation in labor organizations and concerted activity, and collective bargaining. See 29 U. S. C. § 157.

[2] The Board also affirmed the findings of the ALJ that petitioners had violated § 8(a)(1) of the Act by (1) threatening employees with less work if they supported the Union and promising more work if they did not; (2) interrogating employees about their Union sentiments; (3) threatening the employees immediately after the election to notify the INS because they had supported the Union; and (4) threatening to go out of business because the Union won the election.

The Board, however, concluded that the ALJ's analysis of the remedy was "unnecessarily speculative." 234 N. L. R. B., at 1187. Since the record contained no evidence that the employees had not since returned to the United States, the Board modified the ALJ's order by substituting the "conventional remedy of reinstatement with backpay," thereby leaving until subsequent compliance proceedings the determination whether the employees had in fact been available for work.[3] *Ibid.*

On appeal, the Court of Appeals enforced the Board's order. 672 F. 2d 592 (CA7 1982). The court fully agreed that petitioners had violated the NLRA by constructively discharging their undocumented alien employees. It also concurred in the Board's judgment that the usual remedies of reinstatement and backpay were appropriate in these circumstances. The Court of Appeals did, however, modify the Board's order in several significant respects. First, it concluded that reinstatement would be proper only if the discharged employees were legally present and free to be employed in the United States when they presented themselves for reinstatement. The court also decided that the reinstatement offers in their present form were deficient since they did not allow a reasonable time for the employees to make arrangements for legal reentry. The court therefore ordered that the offers be left open for a period of four years. It further concluded that the offers must be written in Spanish, and delivered so as to allow for verification of receipt.

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[3] The Board's General Counsel then filed a motion for clarification in which he suggested that the Board's remedial order might violate national immigration laws by requiring reinstatement and backpay without explicit regard to the legality of the employees' immigration status. The Board denied the General Counsel's motion, over the dissents of two members, who argued that the order's failure to condition the offers of reinstatement on legal presence within this country would encourage illegal reentry by the employees. See *Sure-Tan, Inc.*, 246 N. L. R. B. 788 (1979).

As for backpay, the court required that the discharged employees should be deemed unavailable for work during any period when they were not legally entitled to be present and employed in the United States. Recognizing that the discharged employees would most likely not have been lawfully available for employment and so would receive no backpay award at all, the court decided that "it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs." *Id.*, at 606. Believing that six months' backpay would be the minimum amount appropriate for this purpose, the court suggested that the Board consider this remedy. The Board accepted the court's suggestion, and the final judgment order approved by the court included the minimum award of six months' backpay.[4] We granted certiorari, 460 U. S. 1021 (1983). We now affirm the judgment of the Court of Appeals insofar as it determined that petitioners violated the Act by constructively discharging their undocumented alien employees, but reverse the judgment as to some of the remedies ordered and direct that the case be remanded to the Board.

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[4] The Board did not issue a new decision regarding the 6-month minimum backpay award, but merely submitted a proposed judgment order that was evidently intended to incorporate the proposed award. Upon reviewing the Board's proposed order, the court still remained uncertain whether the Board had in fact adopted its suggestion, and so modified the order to make clear that the employees were entitled to a minimum award of six months' backpay. App. to Pet. for Cert. 28a. A petition for rehearing with suggestion for rehearing en banc was denied, with three judges dissenting. 677 F. 2d 584 (1982).

II

A

We first consider the predicate question whether the NLRA should apply to unfair labor practices committed against undocumented aliens. The Board has consistently held that undocumented aliens are "employees" within the meaning of § 2(3) of the Act.[5] That provision broadly provides that "[t]he term 'employee' shall include any employee," 29 U. S. C. § 152(3), subject only to certain specifically enumerated exceptions. *Ibid.* Since the task of defining the term "employee" is one that "has been assigned primarily to the agency created by Congress to administer the Act," *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130 (1944), the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible. See, *e. g.*, *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 496–497 (1979); *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963).

The terms and policies of the Act fully support the Board's interpretation in this case. The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee." The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. See 29 U. S. C. § 152(3).

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[5] In extending the coverage of the Act to undocumented aliens, the Board has included such workers in bargaining units, see *Duke City Lumber Co.*, 251 N. L. R. B. 53 (1980); *Sure-Tan, Inc., and Surak Leather Co.*, 231 N. L. R. B. 138 (1977), enf'd, 583 F. 2d 355 (CA7 1978), and has found violations of the Act both in their discriminatory discharge, see *Apollo Tire Co.*, 236 N. L. R. B. 1627 (1978), enf'd, 604 F. 2d 1180 (CA9 1979); *Amay's Bakery & Noodle Co.*, 227 N. L. R. B. 214 (1976), and in threats of deportation intended to deter their union activities, see *Hasa Chemical, Inc.*, 235 N. L. R. B. 903 (1978).

Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

Similarly, extending the coverage of the Act to such workers is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process. See *Hearst Publications, Inc.*, *supra*, at 126. As this Court has previously recognized: "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas* v. *Bica*, 424 U. S. 351, 356–357 (1976). If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33 (1937). Thus, the Board's categorization of undocumented aliens as protected employees furthers the purposes of the NLRA.

B

Counterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* This Court has observed that "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas* v. *Bica*, 424 U. S., at 359. The INA evinces "at best evidence of a peripheral concern with employment of illegal entrants." *Id.*, at 360. For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization. While it is unlawful to "concea[l], harbo[r], or shiel[d] from detection" any alien not lawfully entitled to enter or reside in the United States, see 8 U. S. C. § 1324(a)(3), an explicit proviso to the statute explains that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." *Ibid.* See *De Canas* v. *Bica*, *supra*, at 360, and n. 9. Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. See 119 Cong. Rec. 14184 (1973) (remarks of Rep. Dennis). Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

We find persuasive the Board's argument that enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA. A primary purpose in restricting immigration is to preserve jobs for American workers; immigrant aliens are therefore admitted to work in this country only if they "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U. S. C. § 1182(a)(14). See S. Rep. No. 748, 89th Cong., 1st Sess., 15 (1965). Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. The Board's enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws as presently written.

III

Accepting the premise that the provisions of the NLRA are applicable to undocumented alien employees, we must now address the more difficult issue whether, under the circumstances of this case, petitioners committed an unfair labor practice by reporting their undocumented alien employees to the INS in retaliation for participating in union activities. Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U. S. C. § 158(a)(3). The Board, with the approval of lower courts, has long held that an employer violates this provision not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign—a so-called "constructive discharge." See, *e. g.*, *NLRB* v. *Haberman Construction Co.*, 641 F. 2d 351, 358 (CA5 1981) (en banc); *Cartwright Hardware Co.* v. *NLRB*, 600 F. 2d 268, 270 (CA10 1979); *J. P. Stevens & Co.* v. *NLRB*, 461 F. 2d 490, 494 (CA4 1972); *NLRB* v. *Holly Bra of California, Inc.*, 405 F. 2d 870, 872 (CA9 1969); *Atlas Mills, Inc.*, 3 N. L. R. B. 10, 17 (1937). See also 3 T. Kheel, Labor Law § 12.05[1][a] (1982).

Petitioners do not dispute that the antiunion animus element of this test was, as expressed by the lower court, "flagrantly met." 672 F. 2d, at 601. "The record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union." *Id.*, at 601–602. Petitioners contend, however, that their conduct in reporting the undocumented alien workers did not force the workers' departure from the country; instead, they argue, it was the employees' status as illegal aliens that was the actual "proximate cause" of their departure. See Brief for Petitioners 13–15.

This argument is unavailing. According to testimony by an INS agent before the ALJ, petitioners' letter was the sole cause of the investigation during which the employees were taken into custody. This evidence was undisputed by petitioners and amply supports the ALJ's conclusion that "but for [petitioners'] letter to Immigration, the discriminatees would have continued to work indefinitely." 234 N. L. R. B., at 1191. And there can be little doubt that Surak foresaw precisely this result when, having known about the employees' illegal status for some months, he notified the INS only after the Union's electoral victory was assured. See *supra*, at 887; 672 F. 2d, at 601.

We observe that the Board quite properly does not contend that an employer may never report the presence of an illegal alien employee to the INS. See, *e. g.*, *Bloom/Art Textiles, Inc.*, 225 N. L. R. B. 766 (1976) (no violation of Act for employer to discharge illegal alien who was a union activist where the evidence showed that the reason for the discharge was not the employee's protected collective activities, but the employer's concern that employment of the undocumented worker violated state law). The reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged, not penalized. See *In re Quarles*, 158 U. S. 532, 535 (1895).[6] It is only when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee's protected union activity that the Board finds a violation of § 8(a)(3). Absent this specific finding of antiunion animus, it would not be an unfair labor practice to report or discharge an undocumented alien employee. See *Bloom/Art Textiles, Inc., supra.* Such a holding is consistent with the policies of both the INA and the NLRA.

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[6] It is by now well established, however, that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling. See *NLRB* v. *Transportation Management, Inc.*, 462 U. S. 393, 398 (1983). If the Board finds, as it did here, that the otherwise legitimate reason asserted by the employer for a discharge is a pretext, then the nature of the pretext is immaterial, even where the pretext involves a reliance on state or local

Finally, petitioners claim that this Court's recent decision in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731 (1983), mandates the conclusion that their request for enforcement of the federal immigration laws is an aspect of their First Amendment right "to petition the Government for a redress of grievances" and therefore may not be burdened under the guise of enforcing the NLRA.[7] In *Bill Johnson's Restaurants*, the Court held that an employer's filing of a state court suit against its employees seeking damages and injunctive relief for libelous statements and injury to its business is not an enjoinable unfair labor practice unless the suit is filed for retaliatory purposes and lacks a reasonable basis. The Court stressed that the right of access to courts for re-

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laws. See, *e. g., New Foodland, Inc.*, 205 N. L. R. B. 418, 420 (1973) (discriminatory discharge of underage employee). Indeed, as we noted in *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 230, n. 8 (1963), even evidence of a "good-faith motive" for a discriminatory discharge "has not been deemed an absolute defense to an unfair labor practice charge."

[7] Under § 10(e) of the Act, "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U. S. C. § 160(e). We may consider petitioners' First Amendment argument, although not raised before the Board, because the intervening, substantial change in controlling law occasioned by *Bill Johnson's Restaurants* qualifies as an "extraordinary circumstanc[e]." See, *e. g., NLRB* v. *Lundy Manufacturing Corp.*, 286 F. 2d 424, 426 (CA2 1960). As that intervening decision issued six months after the filing of the petition for certiorari in this case, we similarly countenance petitioners' presentation of their First Amendment challenge for the first time before this Court. See, *e. g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320–321, and n. 6 (1971).

dress of wrongs is an aspect of the First Amendment right to petition the government, concluding that the NLRA must be construed in such a way as to be "sensitive" to these First Amendment values. *Id.*, at 741. The Court also noted that the States had a compelling interest in maintaining domestic peace by providing employers with such civil remedies for tortious conduct during labor disputes. If the Board were allowed to enjoin a state lawsuit simply because of retaliatory motive, the employer would "be totally deprived of a remedy for an actual injury," and the strong state interest in providing for such redress would therefore be undermined. *Id.*, at 742.

The reasoning of *Bill Johnson's Restaurants* simply does not apply to petitioners' situation. The employer in that case, though similarly motivated by a desire to discourage the exercise of NLRA rights, was asserting in state court a personal interest in its *own* reputation that was protected by state law. If the Court had upheld the Board in the case, it would have left the employer with no forum in which to pursue a remedy for an "actual injury." *Id.*, at 741. The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a "right of access to the courts . . . 'for redress of alleged wrongs.'" *Ibid.* Petitioners in this case, however, have not suffered a comparable, legally protected injury at the hands of their employees. Petitioners did not invoke the INS administrative process in order to seek the redress of any wrongs committed against them. Cf. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972). Indeed, private persons such as petitioners have no judicially cognizable interest in procuring enforcement of the immigration laws by the INS. Cf. *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973).

Finally, *Bill Johnson's Restaurants* was concerned about whether the Board's interpretation of the NLRA would work to pre-empt the *State* from providing civil remedies for conduct touching interests "'deeply rooted in local feeling and responsibility.'" 461 U. S., at 741 (quoting *San Diego*

Building Trades Council v. *Garmon*, 359 U. S. 236, 244 (1959)). Here, where there is no conflict between the Board's unfair labor practice finding and any asserted state interest, such federalism concerns are simply not at stake. In short, *Bill Johnson's Restaurants* will not support petitioners' efforts to avoid their obligations under the NLRA by reporting their employees to the INS.

IV

There remains for us to consider petitioners' challenges to the remedial order entered in this case. Petitioners attack those portions of the Court of Appeals' order which modified the Board's original order by providing for an irreducible minimum of six months' backpay for each employee and by detailing the language, acceptance period, and verification method of the reinstatement offers.[8] We find that the Court of Appeals exceeded its narrow scope of review in imposing both these modifications.

A

Section 10(c) of the Act empowers the Board, when it finds that an unfair labor practice has been committed, to issue an order requiring the violator to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the NLRA. 29 U. S. C. § 160(c). The Court has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review. See, *e. g., NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 262–263 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 216 (1964); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941). Although the courts of appeals have power under the Act "to make and enter a decree . . . modifying, and enforcing as so modified" the orders of the Board, 29 U. S. C. §§ 160(e), (f), they should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices:

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[8] Petitioners do not challenge the cease and desist order imposed by the Board and affirmed by the Court of Appeals. Under such an order, petitioners will be subject to contempt sanctions should they again resort to the discriminatory tactics employed here. Nor do petitioners appear to challenge the court's modifications of the Board's remedial order conditioning acceptance of the reinstatement offers and the accrual of any backpay upon the discharged employees' legal presence in this country. See n. 12, *infra*.

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp., supra*, at 194.

See also *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953) (power to fashion remedies "is for the Board to wield, not for the courts").

Here, the Court of Appeals impermissibly expanded the Board's original order to provide that each discriminatee would receive backpay for at least six months on the ground that "six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice." 672 F. 2d, at 606. We agree with petitioners that this remedy ordered by the Court of Appeals exceeds the limits imposed by the NLRA.[9]

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[9] JUSTICE BRENNAN asserts that since the Board has "fully acquiesced" in the Court of Appeals' remedy, the case should be reviewed as if the Board itself had developed the remedial order. See *post*, at 907. This argument misses the mark on two levels. First, our traditional deference to such remedial orders is premised upon our appreciation that the Board has duly considered and brought to bear its "special competence" in fashioning appropriate relief in any given unfair labor practice case. See *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 265–266 (1975). Given the

Not only did the court overstep the limits of its own reviewing authority, see *NLRB* v. *Seven-Up Bottling Co.*, *supra*, at 346–347,[10] but it also effectively compelled the Board to take action that simply does not lie within the Board's own powers. Under § 10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders "effectuate the policies of the Act." Although this rather vague statutory command obviously permits the Board broad discretion, at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress. Quite early on, the Court established that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333, 348 (1938). See D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 8–15 (1976). Of course, the general legitimacy of the backpay order as a means to restore the situation "as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge Corp.*, 313 U. S., at 194, is by now beyond dispute. Yet, it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices. *Id.*, at 198 ("[O]nly actual losses should be made

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disparity between the Board's original order and the Court of Appeals' modified order, that premise is patently inapplicable to this case. Moreover, the Board's mere acquiescence in the Court of Appeals' remedial order simply cannot correct the order's main deficiency—its development in the total absence of any record evidence as to the circumstances of the individual employees.

[10] In imposing a minimum backpay award, the Court of Appeals usurped the delegated function of the Board to decide how best to appraise the relevant factors that determine a just backpay remedy. The proper course for a reviewing court that believes a Board remedy to be inadequate is to remand the case to the Board for further consideration. See *supra*, at 899; *NLRB* v. *Food Store Employees*, 417 U. S. 1, 10 (1974).

good . . ."). To this end, we have, for example, required that the Board give due consideration to the employee's responsibility to mitigate damages in fashioning an equitable backpay award. See, *e. g.*, *NLRB* v. *Seven-Up Bottling Co.*, *supra*, at 346; *Phelps Dodge Corp.* v. *NLRB*, *supra*, at 198. Likewise, the Board's own longstanding practice has been to deduct from the backpay award any wages earned in the interim in another job, see *Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 51 (1935), enf'd, 91 F. 2d 178 (CA3 1937), rev'd on other grounds, 303 U. S. 261 (1938).

By contrast, the Court of Appeals' award of a minimum amount of backpay in this case is not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees. The court itself admitted that although it sought to recompense the discharged employees for their lost wages, the actual 6-month period selected was "obviously conjectural." 672 F. 2d, at 606. The court's imposition of this minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA.[11]

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[11] We are also mindful that, prior to the instant case, the Board itself had never claimed the power given it here by the Court of Appeals. To our knowledge, the Board has never attempted to impose a minimum backpay award that the employer must pay regardless of the actual evidence as to such issues as an employee's availability for work or his efforts to secure comparable interim employment. In fact, in this very case, the Board had already rejected as "unnecessarily speculative" the ALJ's recommendation that a 4-week minimum period of backpay be awarded the discharged employees. 234 N. L. R. B., at 1187. The Board now argues that the Court of Appeals' backpay award involves no greater speculation than that which is normally involved in reconstructing what would have happened to certain employees but for their discriminatory discharge. See, *e. g.*, *NLRB* v. *Superior Roofing Co.*, 460 F. 2d 1240 (CA9 1972) *(per curiam)*; *Buncher* v. *NLRB*, 405 F. 2d 787 (CA3 1968), cert. denied, 396 U. S. 828 (1969). In each of these cases, however, the courts enforced the Board's orders upon finding that the Board, in the course of compliance proceedings, had applied to particular facts a reasonable formula for determining the probable

We generally approve the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees. This Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge. See *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S., at 260; *Nathanson* v. *NLRB*, 344 U. S. 25, 29–30 (1952); *Trico Products Corp.* v. *NLRB*, 489 F. 2d 347, 353–354 (CA2 1973). Cf. *Teamsters* v. *United States*, 431 U. S. 324, 371 (1977) (individual Title VII claims to be resolved at remedial hearings held by District Court on remand). These compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled. See *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170 (CA2 1965), cert. denied, 384 U. S. 972 (1966); 3 NLRB Casehandling Manual § 10656 *et seq.* (1977) (preparation of backpay specification).

Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the com-

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length of employment and compensation due and had permitted the employer to come forward with evidence mitigating liability. See, *e. g.*, *NLRB* v. *Superior Roofing Co.*, *supra*, at 1240–1241 (upholding use of a "seniority formula" to compute the earnings of a "representative employee" in a reasonable approximation of discharged roofer's earnings). In the instant case, the Court of Appeals "estimated" an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence. In the absence of relevant factual information or adequate analysis, it is inappropriate for us to conclude, as does JUSTICE BRENNAN, that the Court of Appeals had estimated the proper minimum backpay award "with a fair degree of precision," see *post*, at 909.

pliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another "equally important Congressional objectiv[e]," *Southern S.S. Co.* v. *NLRB*, 316 U. S. 31, 47 (1942)—to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf. 3 NLRB Casehandling Manual §§ 10612, 10656.9 (1977).[12]

The Court of Appeals assumed that, under these circumstances, the employees would receive no backpay, and so awarded a minimum amount of backpay that would effectuate the underlying purposes of the Act by providing some relief to the employees as well as a financial disincentive against the repetition of similar discriminatory acts in the future. 672 F. 2d, at 606. We share the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period. The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act. Any perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by congressional action.[13] By directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work, the

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[12] Conditioning the offers of reinstatement on the employees' legal reentry and deeming the employees "unavailable" during any period when they were not lawfully present are requirements that were in fact imposed by the Court of Appeals in this case, and hence fully accepted by the Board. See 672 F. 2d, at 606 ("Consistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States we modify the Board's order so as to make clear (1) that [except for the minimum backpay award] in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States . . ."); App. to Pet. for Cert. 32a (modified order). Contrary to JUSTICE BRENNAN's assertion, see *post*, at 910, the Board does not argue that it would exempt these employees from its "unavailability" policy because their unavailability is directly attributable to the employer's own unfair labor practice. The Board refers to this limited exception to its normal rule solely to counter petitioners' suggestion that the minimum backpay award is somehow logically "inconsistent" with normal Board policies in calculating backpay. See Brief for Respondent 45, n. 44. The Board has clearly indicated its agreement with these portions of the Court of Appeals' remedial order by specifically noting that petitioners do not challenge these parts of the order, see *id.*, at 43, by limiting its own argument to the minimum backpay award issue alone, see *id.*, at 43–46, and, most importantly, by asking that the judgment below be affirmed in its entirety.

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[13] According to JUSTICE BRENNAN, the Court stands guilty today of creating a "disturbing anomaly" by, on the one hand, holding that undocumented aliens are "employees" within the meaning of the Act and so entitled to bring an unfair labor practice claim, but then, on the other hand, holding that these same employees are "effectively deprived of any remedy . . . ." See *post*, at 911. This argument completely ignores the fact that today's decision leaves intact the cease and desist order imposed by the Board, see n. 7, *supra*, one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act. At the same time, we fully recognize that the reinstatement and backpay awards afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees. Nevertheless, we remain bound to respect the directives of the INA as well as the NLRA and to guard against judicial distortion of the statutory limits placed by Congress on the Board's remedial authority. Any other solution must be sought in Congress and not the courts.

Court of Appeals plainly exceeded its limited authority under the Act.[14]

B

The Court of Appeals similarly exceeded its limited authority of judicial review by modifying the Board's order so as to require petitioners to draft the reinstatement offers in Spanish and to ensure verification of receipt. While such requirements appear unobjectionable in that they constitute a rather trivial burden, they represent just the type of informed judgment which calls for the Board's superior expertise and long experience in handling specific details of remedial relief. See, *e. g.*, *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266–267 (1975); *NLRB* v. *Erie Resistor Corp.*, 373 U. S., at 236. If the court believed that the Board had erred in failing to impose such requirements, the appropriate course was to remand back to the Board for reconsideration. *NLRB* v. *Food Store Employees*, 417 U. S. 1 (1974). Such action "best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." *Id.*, at 10; see 2 T. Kheel, Labor Law § 7.04[3][e] (1984).

The court's requirement that the reinstatement offers be held open for four years is vulnerable to similar attack. The court simply had no justifiable basis for displacing the Board's discretionary judgment about the proper time period for acceptance of the reinstatement offers. Rather than enlarging the Board's remedial order in this fashion, the court was required to remand for the Board to consider the alternative grounds on which the court believed the offers to have been deficient and to decide upon new forms for the reinstatement offers. *NLRB* v. *Food Store Employees, supra.*

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[14] In light of our disposition of this issue, we find it unnecessary to consider petitioners' claim that the minimum backpay awards are "punitive," and hence beyond the authority of the Board under *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 9–12 (1940). We may thus avoid entering into what we have previously deemed "the bog of logomachy" as to what is "remedial" and what is "punitive." *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348 (1953).

V

For the reasons given above, we reverse the judgment of the Court of Appeals insofar as it imposed a minimum backpay award and mandated certain specifics of the reinstatement offers. We therefore remand the case to the Court of Appeals with instructions to remand it back to the Board to permit formulation of an appropriate remedial order consistent with this Court's opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

I fully agree with the Court to the extent it holds, first, that undocumented aliens are "employees" within the meaning of § 2(3) of the National Labor Relations Act (NLRA), 29 U. S. C. § 152(3), and, second, that petitioners plainly violated § 8(a)(3) of the Act, 29 U. S. C. § 158(a)(3), when they reported their undocumented alien employees to the Immigration and Naturalization Service (INS) in retaliation for participating in union activities. Accordingly, I join Parts I, II, and III of the Court's opinion. However, because the Court's treatment of the appropriate remedy departs so completely from our prior cases, I dissent from Part IV of the opinion.

The Court's first mistake is to ignore the fact that the Board, rather than seeking a remand, has expressly urged that we affirm the 6-month backpay and reinstatement remedy provided in the Court of Appeals' enforcement order, because it is fully satisfied that the court's order "effectuates the purposes of the NLRA." Brief for Respondent 11. Of course, it is generally true, as the Court observes, *ante*, at 900, n. 10, that the proper course for a reviewing court that finds a Board remedy inadequate is to remand to the Board, rather than attempting in the first instance to fashion its own remedy. Such a rule protects the Board's congressionally delegated power "to fashion remedies that will effectuate national labor policy" from usurpation by the courts. *NLRB* v. *Food Store Employees*, 417 U. S. 1, 10 (1974). In this case, however, the Board has fully acquiesced in the remedy developed by the Court of Appeals and, consequently, no purpose would be served by remanding to the Board for further consideration of the remedy question. We should instead approach this case as if the Board had developed the remedial order on its own motion and the Court of Appeals had simply enforced that order.

The Court compounds this initial error by devising a new standard for reviewing the propriety of remedies ordered under the NLRA. At the outset of its discussion, the Court correctly states that we have consistently interpreted § 10(c) of the NLRA, 29 U. S. C. § 160(c), as "vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Ante*, at 898–899. The Court goes on, however, to concoct a new standard of review, which considers whether the terms of a remedial order are "sufficiently tailored" to the unfair labor practice it is intended to redress. *Ante*, at 901. Applying its newly minted standard to this case, the Court finds that the remedial order challenged here involved the imposition of requirements on petitioners that "d[o] not lie within the Board's own powers." *Ante*, at 900. Our prior cases, however, provide no support whatsoever for this new standard. Indeed, we have explained that "[w]hen the Board . . . makes an order of restoration by way of backpay, the order 'should stand *unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.*'" *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346–347 (1953) (emphasis added) (quoting

Virginia Electric & Power Co. v. *NLRB*, 319 U. S. 533, 540 (1943)). And we have repeatedly emphasized that a court has only limited authority to review remedial orders developed by the Board to effectuate the purposes of the Act. See *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 262–263 (1969); *NLRB* v. *Seven-Up Bottling Co.*, *supra*, at 346; *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941). Because of that consistent pattern of deference, our cases have never before considered whether a particular remedy is "sufficiently tailored" to the harm it seeks to cure.

If the appropriate standard of review is applied to this case, it is clear that the judgment of the Court of Appeals should be affirmed in its entirety as the Board urges. It is undisputed that absent petitioners' illegal conduct, the five employees involved here would certainly have continued working for and receiving wages from petitioners for some period of time beyond February 18, 1977—the date on which they were discriminatorily discharged. It is equally clear, therefore, that each of these employees suffered some loss of income that was directly attributable to petitioners' unfair labor practices. Accordingly, given such circumstances, it is perfectly reasonable that the Board should in the exercise of its broad remedial powers under § 10(c) of the Act fashion a remedy designed to restore those employees "as nearly as possible [to the situation] that . . . would have obtained but for the illegal discrimination," *Phelps Dodge*, *supra*, at 194, including reinstatement and an award of appropriate backpay. Such a remedial order is in no sense "punitive," since it serves the dual purposes of making whole those employees who were injured by petitioners' conduct and of vindicating the important public purposes of the NLRA. *Virginia Electric & Power Co.* v. *NLRB*, *supra*, at 543. The reinstatement order and the award of a minimum of six months' backpay ordered by the Court of Appeals and supported here by the Board reflect, in my view, a wholly reasonable effort to effectuate those purposes.

The Court, however, identifies what it considers to be two significant problems with that order. First, the 6-month backpay award, in the Court's view, rests solely on "conjecture" and "speculation" and is therefore not "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Ante*, at 901. Second, the Court insists that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Ante*, at 903.

With respect to the Court's first assertion, it is clear that the Board's decision to support the backpay award ordered by the Court of Appeals rests squarely upon its own judgment that this award estimates with a fair degree of precision the period that these employees would have continued working for petitioners had petitioners not reported them to the INS. Indeed, as the Board points out, such an award is no more speculative or conjectural than those developed in other situations commonly confronted by the Board in which it is not clear how long an employment relationship would have continued in the absence of an unfair labor practice. See, *e. g.*, *Buncher* v. *NLRB*, 405 F. 2d 787, 789–790 (CA3 1968), cert. denied, 396 U. S. 828 (1969); *NLRB* v. *Superior Roofing Co.*, 460 F. 2d 1240, 1241 (CA9 1972); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 572–573 (CA5 1966).[1]

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[1] Under the guidelines developed by the General Counsel of the NLRB, the period covered by a backpay award generally includes the time from the discriminatory discharge until the discriminatee either rejects a bona fide offer of reinstatement or is reinstated. See NLRB Casehandling Manual § 10530.1(a) (1977). In this case, of course, because the five undocumented alien employees accepted voluntary departure as a substitute for deportation immediately following their illegal discharge, this normal method of calculating the period of backpay cannot be applied. Instead, just as in *Buncher* v. *NLRB*, an estimate must be made of the income these employees would have earned but for petitioners' unfair labor practices. As the Board has explained, the 6-month period adopted by the Court of

As to the second assertion, the Court provides no explanation for its conclusion that these employees were "unavailable" for work, as a matter of law, following their return to Mexico and that any entitlement to backpay that might otherwise have accrued during that period is therefore tolled. In the first place, such a holding overlooks the Board's longstanding practice of forgiving periods of unavailability that are due to the employer's own illegal conduct. See, *e. g., Graves Trucking Inc.*, 246 N. L. R. B. 344, 345 (1979), enf'd as modified, 692 F. 2d 470, 474–477 (CA7 1982); *Moss Planning Mill Co.*, 103 N. L. R. B. 414, enf'd, 206 F. 2d 557 (CA4 1953); cf. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 566–567 (1981) ("[I]t does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury . . . it has itself inflicted"). In this case, as the Board explains, see Brief for Respondent 45, n. 44, these employees would not necessarily have been found unavailable, because their immediate departure from the country was plainly and directly attributable to petitioners' illegal conduct. Thus, by presuming to foreclose a remedy that the Board itself is prepared to grant, the Court today is far more guilty of usurping the remedial functions of the Board than was the Court of Appeals.[2]

Appeals reflects a reasonable estimate, under the particular circumstances of this case, of the earnings that these employees lost as a result of petitioners' illegal conduct.

[2] The Court of Appeals expressed concern that some of the discharged alien employees might not be able to establish—because of their undocumented immigration status—that they were lawfully available for reemployment during the normal backpay period between their illegal discharge and acceptance of reinstatement, and would therefore not be entitled to claim backpay. See 672 F. 2d 592, 606 (CA7 1982); App. to Pet. for Cert. 28a. But, in order to ensure that petitioners bore some responsibility for the "discriminatory act[s] which caused these employees to lose their jobs," the court concluded that a minimum backpay award was necessary to effectuate the purposes of the NLRA. 672 F. 2d, at 606; see also App. to Pet. for Cert. 28a. As the Board explains in its brief, such a

More importantly, the Court never addresses the disturbing anomaly it creates by holding in Parts II and III that undocumented aliens are "employees" within the meaning of the Act, and thereby entitled to all of the protections that come with that status, but then finding in Part IV that these same alien employees are effectively deprived of any remedy, despite a clear violation of the NLRA by their employer. In Part II, the Court concludes that undocumented aliens must be considered employees protected under the Act, notwithstanding the fact that they are not lawfully entitled to be present in the United States while they are employed here. *Ante*, at 891–894. But that holding is then flatly contradicted by the Court's assertion in Part IV that these alien employees must be considered "unavailable" for work, and therefore not entitled to backpay under the NLRA, during any period when they were not lawfully entitled to be present in the United States. *Ante*, at 903. If these undocumented alien employees are entitled, as the Court finds they are, to press an unfair labor practice claim before the Board on the basis of their discriminatory discharge by petitioners, and if the Board may properly find that an unfair labor practice was committed, then I fail to see why these same employees should be stripped of the normal remedial protections of the Act.

The contradiction in the Court's opinion is total. In explaining why enforcement of the NLRA with respect to undocumented alien employees is compatible with national immigration policy, the Court observes:

> "Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien

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backpay award is wholly consistent with its own longstanding policy that "where unavailability is due to an illness, injury, or other event that would not have occurred but for the unlawful discharge, backpay liability will not be tolled for that period." Brief for Respondent 45, n. 44.

> employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Ante*, at 893.

But the force of this logic is blunted by the Court's decision to restrict drastically the remedies available to undocumented alien employees. Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their "incentive to hire such illegal aliens" will not decline, it will increase. And the purposes of both the NLRA and the Immigration and Naturalization Act (INA) that are supposedly served by today's decision will unquestionably be undermined.[3]

Moreover, permitting backpay awards in these circumstances creates little risk of undermining the policies of the INA. As long as offers of reinstatement are conditioned upon the employee's legal reentry to this country, any incentive to return illegally to the United States that such a Board-ordered remedy might otherwise create is, as the Court itself properly notes, see *ante*, at 902–903, effectively removed.

Finally, with respect to the Court of Appeals' requirement that the offers of reinstatement remain open for four years to permit the discharged alien employees a reasonable time to seek legal reentry to the United States, that these offers be drafted in Spanish, and that receipt of the offers be verified, it should be noted that all of these remedies serve, in the judgment of the Board, "reasonably [to] effectuate the purposes of the Act in the circumstances of this case." Brief for Respondent 47. Although, as I have said, I generally agree with the Court that reviewing courts should remand to the Board rather than unilaterally imposing modifications of this sort, see *ante*, at 905–906, it seems clear that in this case the Board has fully accepted these requirements as measures that further national labor policy and accommodate the competing purposes of the INA. Under those circumstances, I see no reason to require a remand. Accordingly, I would affirm the judgment of the Court of Appeals.

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[3] In its struggle to justify the contradiction it has created, the Court recognizes, as it must, that "reinstatement and backpay awards afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees." *Ante*, at 904, n. 13. Given that fact, the Board's resolute position that reinstatement and backpay awards are necessary to effectuate the policies of the NLRA, and the fact that the policies of the INA do not require the Court's result, I am at a loss to understand why the Court insists upon denying these employees the normal remedies that the Board has seen fit to provide.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I dissent from the Court's finding that the illegal aliens involved in this case are "employees" within the meaning of that term in the National Labor Relations Act. It is unlikely that Congress intended the term "employee" to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws. I therefore would hold that the illegal alien workers are not entitled to any remedy. Given the Court's holding, however, that they are entitled to the protections of the NLRA, I join Part IV of the Court's opinion.*

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*Although the difference in the remedy approved by the Court and that urged in JUSTICE BRENNAN's opinion is essentially one of degree, the former provides less incentive for aliens to enter and reenter the United States illegally.

TOWER, PUBLIC DEFENDER OF DOUGLAS COUNTY, OREGON, ET AL. *v.* GLOVER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1988. Argued February 22, 1984—Decided June 25, 1984

Petitioner Tower, the Douglas County, Ore., Public Defender, represented respondent at a state robbery trial that resulted in respondent's conviction, and petitioner Babcock, the Oregon State Public Defender, represented respondent in his unsuccessful appeal from this and at least one other conviction. Subsequently, respondent filed in state court a petition for postconviction relief, seeking to have his conviction set aside on the ground that petitioners had conspired with various state officials, including the trial and appellate court judges and the former Attorney General, to secure respondent's conviction. On the following day, respondent filed the instant action against petitioners in Federal District Court under 42 U. S. C. § 1983, seeking only to recover punitive damages on the basis of factual allegations that were identical to those made in the state-court petition. The District Court granted petitioners' motion to dismiss the § 1983 action, holding that public defenders are absolutely immune from § 1983 liability, but the Court of Appeals reversed and remanded the case for trial. Prior to the Court of Appeals' decision, the state-court proceedings came to trial and resulted in a finding that there had been no conspiracy to convict respondent.

Held:

1. Respondent's complaint adequately alleges conduct "under color of" state law for purposes of § 1983, in view of the conspiracy allegations. Although appointed counsel in a state criminal prosecution does not act "under color of" state law in the normal course of conducting the defense, *Polk County* v. *Dodson*, 454 U. S. 312, an otherwise private person acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights, *Dennis* v. *Sparks*, 449 U. S. 24. Pp. 919-920.

2. State public defenders are not immune from liability under § 1983 for intentional misconduct by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights. For purposes of § 1983, immunities are predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. No immunity for public defenders, as such, existed at common law in 1871, when § 1983's predecessor was enacted, because there was no such office in existence at that time. Although a

public defender has a reasonably close "cousin" in the English barrister, and although barristers enjoyed in the 19th century and still enjoy a broad immunity from liability for negligent misconduct, nevertheless barristers have never enjoyed immunity from liability for intentional misconduct. In this country the public defender's only 19th-century counterpart was a privately retained lawyer, and such a lawyer would not have enjoyed immunity from tort liability for intentional misconduct such as that allegedly involved here. Nor is immunity warranted on the asserted ground that public defenders have responsibilities similar to those of a judge or prosecutor and should enjoy similar immunities in order, ultimately, not to impair the State's attempt to meet its constitutional obligation to furnish criminal defendants with effective counsel, and in order to prevent inundation of the federal courts with frivolous lawsuits. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate. Pp. 920–923.

3. It is open to the District Court on remand to consider whether respondent is now collaterally estopped in this action by the state court's finding that the alleged conspiracy never occurred. Pp. 923–924.

700 F. 2d 556, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined, and in all but the first paragraph of Part IV of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 924.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *William F. Gary*, Deputy Attorney General, *James E. Mountain, Jr.*, Solicitor General, and *Michael D. Reynolds*, *William F. Nessly, Jr.*, and *Roy E. Pulvers*, Assistant Attorneys General.

Craig K. Edwards argued the cause for respondent. With him on the brief was *Richard A. Slottee*.*

**Jim Smith*, Attorney General, *Mitchell D. Franks*, and *James A. Peters* and *Eric J. Taylor*, Assistant Attorneys General, filed a brief for the State of Florida as *amicus curiae* urging reversal.

John S. Ransom and *Diane L. Alessi* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioners are two public defenders working in the State of Oregon. Petitioner Bruce Tower, the Douglas County Public Defender, represented respondent Billy Irl Glover at one of Glover's state trials on robbery charges, at which Glover was convicted. Petitioner Gary Babcock, the Oregon State Public Defender, represented Glover in Glover's unsuccessful state-court appeal from this and at least one other conviction.

In an action brought under 42 U. S. C. § 1983, Glover alleges that petitioners conspired with various state officials, including the trial and appellate court judges and the former Attorney General of Oregon, to secure Glover's conviction. Glover seeks neither reversal of his conviction nor compensatory damages, but asks instead for $5 million in punitive damages to be awarded against each petitioner. App. 5, 9. We conclude that public defenders are not immune from liability in actions brought by a criminal defendant against state public defenders who are alleged to have conspired with state officials to deprive the § 1983 plaintiff of federal constitutional rights.

I

Glover was arrested on February 1, 1976, in Del Norte County, Cal. Pet. for Cert. in *Glover* v. *Dolan*, O. T. 1978, No. 78–5457, p. 3. The State of California extradited Glover to Benton County, Ore., on December 6, 1976.[1] Upon arriving in Oregon Glover immediately filed for habeas corpus relief in Federal District Court, seeking, apparently, a stay of his pending state-court trial. A hearing on this petition was held in January 1977, and immediate relief was denied.[2]

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[1] Motion for Leave to Proceed *In Forma Pauperis* filed in connection with Pet. for Cert. in *Glover* v. *Dolan*, O. T. 1978, No. 78–5457, p. 4; *Glover* v. *Dolan*, No. 77–276 (Dist. Ct. Ore.) (Magistrate's Findings and Recommendation, Dec. 6, 1977), reprinted in App. to Response to Pet. for Cert. in *Glover* v. *Dolan*, O. T. 1978, No. 78–5457, p. A–1.

Before any final disposition of his federal habeas action, Glover was tried and convicted on different robbery charges in at least two Oregon state courts. One trial—the trial to which this § 1983 action is directly linked—was held in Douglas County Circuit Court, case No. 76–0386. Glover was represented by petitioner Tower, and was convicted. Petitioner Babcock represented Glover in the appeal from that conviction. The conviction was summarily affirmed by the Oregon Court of Appeals on January 18, 1978. *Oregon* v. *Glover*, 32 Ore. App. 177, 573 P. 2d 780. A second robbery trial—the trial in connection with which Glover had filed his federal habeas action—was held in the Benton County Circuit Court, case No. 31159. Pet. for Cert. in No. 78–5457, *supra*, at 6, 9. On April 6, 1977, Glover was convicted; five days later he was sentenced to 10 years in prison. This conviction was affirmed on April 17, 1978. *Oregon* v. *Glover*, 33 Ore. App. 553, 577 P. 2d 91. Petitioner Babcock represented Glover in this state-court appeal as well.

Meanwhile, on December 6, 1977, the Federal Magistrate to whom Glover's habeas petition had been referred recommended that it be dismissed. On March 6, 1978, the District Court dismissed the habeas petition on the ground that Glover had failed to exhaust state remedies. *Glover* v. *Dolan*, No. 77–276 (Dist. Ct. Ore.). Glover gave notice of appeal to the Court of Appeals for the Ninth Circuit, but the District Court refused to issue a certificate of probable cause. The Court of Appeals dismissed Glover's application for a certificate of probable cause on July 12, 1978, agreeing with the District Court that Glover had failed to exhaust state remedies. *Glover* v. *Dolan*, No. 78–8077 (CA9). In a petitition for a writ of certiorari filed with this Court, Glover contended that the Ninth Circuit and the District Court had erred in requiring him to exhaust state-court remedies before bringing his federal habeas petition. This Court denied the petition for certiorari. 439 U. S. 1075 (1979).

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[2] *Id.*, at A–2; Pet. for Cert. in *Glover* v. *Dolan*, O. T. 1978, No. 78–5457, p. 10; *Glover* v. *Dolan*, *supra*, at A–2.

While incarcerated in the Oregon State Penitentiary, Glover then initiated new lawsuits, again attacking his conviction simultaneously in both state and federal courts, and these suits, again, proceeded in parallel for almost three years. First, on December 11, 1980, Glover filed a petition for postconviction relief in the Circuit Court of the State of Oregon for Marion County, seeking to have his conviction set aside on the basis of the alleged conspiracy between his lawyers and various state officials. This state-court petition was later consolidated with a petition for postconviction relief filed in connection with Glover's Benton County conviction. On the following day, December 12, 1980, Glover filed this § 1983 action against petitioners in Federal District Court.[3] His factual allegations were identical to those made in the state-court petition—indeed, Glover simply appended copies of papers filed in state court to his federal-court complaint.

On April 1, 1981, the Federal District Court granted petitioners' motion to dismiss Glover's § 1983 action, relying on a decision of the Court of Appeals for the Ninth Circuit that had held public defenders absolutely immune from § 1983 liability, *Miller* v. *Barilla*, 549 F. 2d 648 (1977). App. B to Pet. for Cert.

On February 23, 1983, the consolidated state-court petitions came to trial before the Marion County Circuit Court. The state court found that there had been no conspiracy to convict Glover and therefore denied Glover's request for relief.[4] Two weeks later, on March 1, 1983, the Court of Appeals for the Ninth Circuit reversed the Federal District Court's decision and remanded for trial in light of this Court's decisions in *Ferri* v. *Ackerman,* 444 U. S. 193 (1979), and *Polk County* v. *Dodson,* 454 U. S. 312 (1981). 700 F. 2d 556. On May 31, 1983, petitioners filed in this Court a petition for writ of certiorari to the Court of Appeals for the Ninth Circuit. On June 29, 1983, Glover filed a notice of appeal in the State Court of Oregon Court of Appeals on the consolidated judgment from the Marion County court. The Oregon Court of Appeals dismissed Glover's appeal for failure to prosecute on August 22, 1983. We issued a writ of certiorari to the Court of Appeals for the Ninth Circuit on October 3, 1983. 464 U. S. 813.

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[3] We note that Glover's § 1983 complaint, filed December 12, 1980, asserts that Glover has not "begun other lawsuits in state or federal court dealing with the same facts involved in this [§ 1983] action or otherwise relating to [his] imprisonment." App. 2. This statement was apparently accurate when Glover signed the complaint, but had ceased to be so when the complaint was actually filed in Federal District Court. There is no reference in the decisions of the Federal District Court or Court of Appeals to the parallel proceedings that were then in progress in the state courts.

II

Title 42 U. S. C. § 1983 provides that "[e]very person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. Petitioners concede, and the Court of Appeals agreed, that Glover's conspiracy allegations "cast the color of state law over [petitioners'] actions." Brief for Petitioners 14; see 700 F. 2d., at 558, n. 1.

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[4] In its "Findings of Fact" the Marion County Court stated:

"1. The trial judge did not act to the prejudice of the petitioner in that:

. . . . .

"b) Trial judge did not arbitrarily exclude evidence and witnesses.

"c) Trial judge did not participate in a conspiracy against petitioner with the trial counsel.

"2. Petitioner was afforded effective assistance of trial counsel as trial counsel was adequately prepared for trial in securing the necessary evidence and witnesses.

. . . . .

"4. Petitioner was afforded effective assistance of appellate counsel . . . ."

Marion County Circuit Court's Findings of Fact, Conclusions of Law and Judgment in No. 125,747, pp. 2–3, (June 2, 1983).

In *Polk County* v. *Dodson, supra,* we held that appointed counsel in a state criminal prosecution, though paid and ultimately supervised by the State, does not act "under color of" state law in the normal course of conducting the defense. See also *Ferri* v. *Ackerman, supra.* In *Dennis* v. *Sparks,* 449 U. S. 24, 27–28 (1980), however, the Court held that an otherwise private person acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights. Glover alleges that petitioners conspired with state officials, and his complaint, therefore, includes an adequate allegation of conduct "under color of" state law.

III

On its face § 1983 admits no immunities. But since 1951 this Court has consistently recognized that substantive doctrines of privilege and immunity may limit the relief available in § 1983 litigation. See *Imbler* v. *Pachtman,* 424 U. S. 409, 417–419 (1976); *Pulliam* v. *Allen,* 466 U. S. 522 (1984). The Court has recognized absolute § 1983 immunity for legislators acting within their legislative roles, *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), for judges acting within their judicial roles, *Pierson* v. *Ray,* 386 U. S. 547, 554–555 (1967), for prosecutors, *Imbler* v. *Pachtman, supra,* and for witnesses, *Briscoe* v. *LaHue,* 460 U. S. 325 (1983), and has recognized qualified immunity for state executive officers and school officials, see *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974); *Wood* v. *Strickland,* 420 U. S. 308 (1975).

Section 1983 immunities are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman, supra,* at 421; *Pulliam* v. *Allen, supra,* at 529. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. See *Imbler* v. *Pachtman,* *supra,* at 424–429; *Briscoe* v. *LaHue, supra,* at 335–337. Using this framework we conclude that public defenders have no immunity from § 1983 liability for intentional misconduct of the type alleged here.

No immunity for public defenders, as such, existed at common law in 1871 because there was, of course, no such office or position in existence at that time. The first public defender program in the United States was reportedly established in 1914. Mounts, Public Defender Programs, Professional Responsibility, and Competent Representation, 1982 Wis. L. Rev. 473, 476. Our inquiry, however, cannot stop there. Immunities in this country have regularly been borrowed from the English precedents, and the public defender has a reasonably close "cousin" in the English barrister. Like public defenders, barristers are not free to pick and choose their clients. They are thought to have no formal contractual relationship with their clients, and they are incapable of suing their clients for a fee. See *Rondel* v. *Worsley,* [1969] 1 A. C. 191; Kaus & Mallen, The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice," 21 UCLA L. Rev. 1191, 1193–1195, nn. 7–9 (1974). It is therefore noteworthy that English barristers enjoyed in the 19th century, as they still do today, a broad immunity from liability for negligent misconduct. *Rondel* v. *Worsley, supra,* a recent decision from the House of Lords, traces this immunity from its origins in 1435 until the present. Nevertheless, it appears that even barristers have never enjoyed immunity from liability for intentional misconduct, *id.,* at 287 (opinion of Lord Pearson), and it is only intentional misconduct that concerns us here.

In this country the public defender's only 19th-century counterpart was a privately retained lawyer, and petitioners do not suggest that such a lawyer would have enjoyed immunity from tort liability for intentional misconduct. Cf. *Baker* v. *Humphrey,* 101 U. S. 494 (1880); *Von Wallhoffen* v. *Newcombe,* 10 Hun. 236 (N. Y. Sup. Ct. 1877); *Hoopes*

v. *Burnett*, 26 Miss. 428 (1853). This pattern has continued. Petitioners concede that Oregon, the State in which they practice, has given no indication, by statute or appellate decision, that public defenders are immune under state tort law from liability for intentional misconduct. Indeed, few state appellate courts have addressed the question of public defender immunity;[5] none to our knowledge has concluded that public defenders should enjoy immunity for intentional misconduct. It is true that at common law defense counsel would have benefited from immunity for defamatory statements made in the course of judicial proceedings, see *Imbler* v. *Pachtman*, *supra*, at 426, n. 23, and 439 (WHITE, J., concurring in judgment), but this immunity would not have covered a conspiracy by defense counsel and other state officials to secure the defendant's conviction.

Finally, petitioners contend that public defenders have responsibilities similar to those of a judge or prosecutor, and therefore should enjoy similar immunities. The threat of § 1983 actions based on alleged conspiracies among defense counsel and other state officials may deter counsel from engaging in activities that require some degree of cooperation with prosecutors—negotiating pleas, expediting trials and appeals, and so on. Ultimately, petitioners argue, the State's attempt to meet its constitutional obligation to furnish criminal defendants with effective counsel will be impaired. At the same time, the federal courts may be inundated with frivolous lawsuits.

Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate. We conclude that state public defenders are not immune from liability under § 1983 for intentional misconduct, "under color of" state law, by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights.

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[5] *Windsor* v. *Gibson*, 424 So. 2d 888 (Fla. App. 1982); *Donigan* v. *Finn*, 95 Mich. App. 28, 290 N. W. 2d 80 (1980); *Reese* v. *Danforth*, 486 Pa. 479, 406 A. 2d 735 (1979); *Spring* v. *Constantino*, 168 Conn. 563, 362 A. 2d 871 (1975). But see *Scott* v. *City of Niagara Falls*, 95 Misc. 2d 353, 407 N. Y. S. 2d 103 (Sup. 1978) (public defenders enjoy immunity for discretionary decisions taken in pursuance of their duties as public defenders).

IV

As we have already described *supra*, at 916–919, Glover has already had more than one day in court. Indeed, those not familiar with the delicate intricacies of § 1983 jurisdiction might characterize Glover's successful initiation and prosecution of entirely parallel and duplicative state and federal actions as a great waste of judicial resources. But it appears that by now, at least, Glover has exhausted or defaulted on state-court opportunities to have his conviction set aside on the basis of the alleged conspiracy among his lawyers and state officials. We therefore have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself.[6] Cf. *Younger* v. *Harris*, 401 U. S. 37 (1971) (federal court may not enjoin ongoing criminal proceeding); *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973) (§ 1983 action for injunctive relief may not be used to bypass exhaustion requirements of federal habeas corpus action); *Juidice* v. *Vail*, 430 U. S. 327, 339, n. 16 (1977) (this Court has had no occasion to determine whether a § 1983 damages action may engage *Younger* principles); *Patsy* v. *Florida Board of*

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[6] See, *e. g.*, *Meadows* v. *Evans*, 529 F. 2d 385, 386 (CA5 1976), aff'd en banc, 550 F. 2d 345, cert. denied, 434 U. S. 969 (1977); *Martin* v. *Merola*, 532 F. 2d 191, 194–195 (CA2 1976); *Guerro* v. *Mulhearn*, 498 F. 2d 1249, 1251–1255 (CA1 1974); *Alexander* v. *Emerson*, 489 F. 2d 285 (CA5 1973).

Regents, 457 U. S. 496, 518–519 (1982) (WHITE, J., concurring in part) ("[A] defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court").

It is open to the District Court on remand to consider whether Glover is now collaterally estopped in this action by the state court's finding that the conspiracy alleged in Glover's § 1983 complaint never occurred. *Allen* v. *McCurry*, 449 U. S. 90 (1980); see n. 4, *supra*. The judgment of the Court of Appeals for the Ninth Circuit is affirmed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and concurring in the judgment.

I agree fully with both the Court's judgment and the reasoning used to arrive at its conclusion. Ordinarily, such complete agreement would make further writing quite unnecessary. But this is not an ordinary case. Although the issue was never raised by the parties, and although, as the Court properly concedes, the issue has absolutely no bearing on the disposition of this case, the Court nevertheless has seen fit to observe that it "ha[s] no occasion to decide" whether federal courts should "abstain" from deciding a state prisoner's § 1983 suit for damages stemming from an unlawful conviction pending that prisoner's exhaustion of collateral state-court challenges to his conviction. *Ante*, at 923. The reasons why the Court has no "occasion" to decide this question are clear enough: The question was never pressed or passed upon below, never briefed or argued in this Court, and, because respondent Glover has already exhausted all state-court remedies, the issue has no bearing whatsoever on the proper resolution of the controversy we have been called upon to decide. Accordingly, I join all of the Court's opinion except the unnecessary paragraph at the beginning of Part IV.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* JOHNSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83–747. Argued April 24, 1984—Decided June 26, 1984

Section 4(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act) provides that "[e]very employer shall be liable for and shall secure the payment to his employees" of compensation payable under the Act, and further provides that "[i]n the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment." Section 5(a) provides that the liability of an "employer" prescribed in § 4 shall be exclusive and in place of all other liability of "such employer" to the employee, except that if an "employer" fails to secure payment of compensation as required by the Act, an injured employee may elect to claim compensation under the Act or to maintain an action at law or in admiralty for damages. Petitioner, a general contractor governed by the Act and responsible for construction of a rapid transit system (Metro) for the District of Columbia and surrounding metropolitan area, purchased a comprehensive "wrap-up" workers' compensation insurance policy to cover all employees of subcontractors engaged in the construction of Metro. Respondents, employees of subcontractors who had not secured their own workers' compensation insurance, after having obtained compensation awards from petitioner's insurer for work-related injuries, each brought a tort action against petitioner in Federal District Court to supplement such awards. The court in each case awarded summary judgment to petitioner, holding that by purchasing workers' compensation insurance for the employees of its subcontractors, petitioner had earned § 5(a)'s immunity from tort suits brought for work-related injuries. In a consolidated appeal, the Court of Appeals reversed, taking the view that § 5(a)'s grant of immunity applies to a general contractor only if the contractor secures compensation after the subcontractor fails to do so. The court therefore concluded that since petitioner unilaterally purchased the "wrap-up" policy and thus preempted its subcontractors, it was not entitled to § 5(a)'s immunity.

Held:

1. Section 5(a)'s grant of immunity extends to general contractors. While § 5(a) speaks in terms of an "employer" and a general contractor

does not act as an employer of a subcontractor's employees, there is ample evidence in the use of the term "employer" elsewhere in the LHWCA to infer that Congress intended the term to include general contractors as well as direct employers. This is particularly so with respect to § 5(a) inasmuch as granting tort immunity to contractors who comply with § 4(a) is consistent with the *quid pro quo* underlying workers' compensation statutes whereby in return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries, while the employer, as a reward for securing compensation, is granted immunity from employee tort suits. Pp. 933–936.

2. A general contractor qualifies for § 5(a) immunity as long as it does not fail to meet its obligations to secure compensation for subcontractor employees under § 4(a). Section 4(a) simply places on general contractors a contingent obligation to secure compensation whenever a subcontractor has failed to do so. This is the most natural reading of § 4(a). Moreover, this reading furthers the underlying policy of the LHWCA to ensure that workers are not deprived of compensation coverage, and saves courts from the onerous task of determining when subcontractors have defaulted on their own statutory obligations. Pp. 936–940.

3. Based on the above interpretations of §§ 4(a) and 5(a), petitioner was entitled to immunity from respondents' tort actions. Far from failing to secure payment of compensation as required by the LHWCA, petitioner acted above and beyond its statutory obligation by purchasing the "wrap-up" insurance on behalf of all its subcontractors. Pp. 940–941.

230 U. S. App. D. C. 297, 717 F. 2d 574, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 941.

E. Barrett Prettyman, Jr., argued the cause for petitioner. With him on the briefs were *Vincent H. Cohen, Walter A. Smith, Jr., Robert B. Cave, Susan M. Hoffman*, and *Arthur Larson*.

William F. Mulroney argued the cause for respondents. With him on the brief were *Peter J. Vangsnes* and *James M. Hanny*.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of American Insurers by *Thomas D. Wilcox;* for the Commonwealth of Virginia et al. by *Gerald L. Baliles*, Attorney General of Virginia, and *Stephen*

JUSTICE MARSHALL delivered the opinion of the Court.

Section 4(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. (part 2) 1426, 33 U. S. C. § 904(a), makes general contractors responsible for obtaining workers' compensation coverage for the employees of subcontractors under certain circumstances. The question presented by this case is when, if ever, these general contractors are entitled to the immunity from tort liability provided in § 5(a) of the Act, 33 U. S. C. § 905(a).

I

Petitioner Washington Metropolitan Area Transit Authority (WMATA) is a government agency created in 1966 by the District of Columbia, the State of Maryland, and the Commonwealth of Virginia with the consent of the United States Congress.[1] WMATA is charged with the construction and operation of a rapid transit system (Metro) for the District of Columbia and the surrounding metropolitan region. Under the interstate compact that governs its existence, WMATA is authorized to hire subcontractors to work on various aspects of the Metro construction project.[2] Since 1966 WMATA has engaged several hundred subcontractors, who in turn have employed more than a thousand sub-subcontractors.[3]

Of the multifarious problems WMATA faced in constructing the Metro system, one has been ensuring that workers engaged in the project in the District of Columbia are cov-

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H. Sachs, Attorney General of Maryland; and for the National Association of Minority Contractors by *Frederick B. Abramson*.

Laurence T. Scott, *J. Joseph Barse*, and *Pamela Bresnahan* filed a brief for Machean-Grove-Skanska Joint Venture et al. as *amici curiae* urging affirmance.

[1] See Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. 89-774, 80 Stat. 1324; D. C. Code § 1-2431 (1981); 1965 Md. Laws, ch. 869; 1966 Va. Acts, ch. 2.

[2] See 80 Stat. 1329.

[3] For the remainder of this opinion, the term "subcontractor" will be used to include both subcontractors and sub-subcontractors.

ered by workers' compensation insurance. Under § 4(a) of the LHWCA,[4] general contractors "shall be liable for and shall secure the payment of [workers'] compensation to employees of the subcontractor unless the subcontractor has secured such payment." 33 U. S. C. § 904(a). A company "secures" compensation either by purchasing an insurance policy or by obtaining permission from the Secretary of Labor to self-insure and make compensation payments directly to injured workers. 33 U. S. C. § 932(a). The effect of § 4(a) is to require general contractors like WMATA[5] to obtain workers' compensation coverage for the employees of subcontractors that have not secured their own compensation. See *infra*, at 938.

During the initial phase of Metro construction, which ran from 1969 to 1971, WMATA relied upon its subcontractors to purchase workers' compensation insurance for subcontractor employees. However, when the second phase of construction began, WMATA abandoned this policy in favor of a more centralized insurance program. As a financial matter, WMATA discovered that it could reduce the cost of workers' compensation insurance if it, rather than its numerous subcontractors, arranged for insurance. Practical considerations also influenced WMATA's decision to change its workers' compensation program. Requiring subcontractors to purchase their own insurance apparently hampered WMATA's affirmative action program, because many minority subcontractors were unable to afford or lacked sufficient business experience to qualify for their own workers' compensation insurance policies.[6] Moreover, as the number of Metro subcontractors grew, it became increasingly burdensome for WMATA to monitor insurance coverage at every tier of the Metro hierarchy. Periodically, subcontractors' insurance would expire or their insurance companies would go out of business without WMATA's being informed. In such cases, a group of employees went uninsured, and WMATA technically breached its statutory duty to ensure that these employees were covered by compensation plans.

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[4] District of Columbia Code § 36-501 (1973) incorporates the LHWCA, 33 U. S. C. § 901 *et seq.*, to cover employees "carrying on any employment in the District of Columbia." In the other two jurisdictions in which WMATA operates, state statutes place general contractors under similar duties to ensure that subcontractor employees are covered by worker's compensation insurance. See Md. Ann. Code, Art. 101 *et seq.* (1979 and Supp. 1983); Va. Code § 65.1-30 *et seq.* (1980).

[5] Despite contrary findings by the District Courts and Court of Appeals, respondents persist in arguing that WMATA is not a general contractor for purposes of the LHWCA. Whether WMATA serves as the general contractor for the entire Metro construction project turns on a factual inquiry into WMATA's responsibility for supervising project construction. Because the lower courts' findings have ample support in the record, see, *e. g.*, App. 163–184, 276–280, we accept their conclusion that WMATA is a general contractor for purposes of § 4(a) of the LHWCA. See *Rogers* v. *Lodge*, 458 U. S. 613 (1982).

For all of these reasons, WMATA elected to assume responsibility for securing workers' compensation insurance for all Metro construction employees. Effective July 31, 1971, WMATA purchased a comprehensive "wrap-up" policy from the Lumberman's Mutual Casualty Co. Under the policy, WMATA paid a single premium and, in return, Lumberman's Mutual agreed to make compensation payments for any injuries suffered by workers employed at Metro construction sites and compensable under the relevant workers' compensation regimes.[7] After arranging for this "wrap-up" coverage, WMATA informed potential subcontractors that WMATA would "for the benefit of contractors and others, procure and pay premiums" for workers' compensation insurance and that the cost of securing such compensation insurance need no longer be included in bids submitted for Metro construction jobs. App. 104, 106. Subcontractors, however, were also advised that, if they deemed it necessary, they could "at their own expense and effort" obtain their own workers' compensation insurance. *Id.*, at 104. Once subcontractors were awarded Metro contracts, Lumberman's Mutual issued certificates of insurance confirming that the subcontractor's employees were covered by WMATA's policy. On these certificates, both WMATA and the subcontractor were listed as parties to whom the insurance was issued. *Id.*, at 225.

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[6] As a result of its federal funding, WMATA is charged with ensuring that minority business enterprises have a full opportunity to participate in the Metro construction project. See Urban Mass Transportation Act of 1964, § 12, 49 U. S. C. § 1608(f); 49 CFR § 23.1 *et seq.* (1983).

[7] WMATA's own employees were not covered by the Lumberman's Mutual policy. For these employees, WMATA has qualified as a self-insurer under § 32(a)(1) of the LHWCA, 33 U. S. C. § 932(a)(1).

Respondents are employees of subcontractors engaged in the Metro project. Each respondent filed a compensation claim for work-related injuries. Most of these claims alleged respiratory injuries caused by high levels of silica dust and other industrial pollutants at Metro sites. None of respondents' employers had secured its own workers' compensation insurance, and respondents' claims were therefore handled under the Lumberman's Mutual policy purchased by WMATA. Lumberman's Mutual paid five of the respondents lump-sum compensation awards in complete settlement of their claims. The remaining two respondents received partial awards from Lumberman's Mutual.

The instant litigation arose when respondents attempted to supplement their workers' compensation awards by bringing tort actions against WMATA. These suits, which were filed before five different judges in the United States District Court for the District of Columbia, involved the same work-related incidents that had given rise to respondents' LHWCA claims. In each of the actions, WMATA moved for summary judgment on the ground that it was immune from tort liability for such claims under § 5(a) of the LHWCA, 33 U. S. C. § 905(a). In all of the District Court cases, WMATA's motions for summary judgment were granted, each judge agreeing that, by purchasing workers' compensation insurance for the employees of its subcontractors, WMATA had earned

§ 5(a)'s immunity from tort suits brought for work-related injuries.

In a consolidated appeal, the United States Court of Appeals for the District of Columbia Circuit reversed. *Johnson* v. *Bechtel Associates Professional Corp.*, 230 U. S. App. D. C. 297, 717 F. 2d 574 (1983). The Court of Appeals reasoned that § 5(a) of the LHWCA grants general contractors immunity from tort actions by subcontractor employees only if the general contractor has secured compensation insurance in satisfaction of a statutory duty. According to the Court of Appeals, WMATA had not acted under such a duty in this case. Had respondents' employers actually refused to secure the worker's compensation insurance, then WMATA as general contractor would have had what the Court of Appeals considered a statutory duty to secure insurance for respondents. However, WMATA never gave respondents' employers the opportunity to default on their statutory obligations to secure compensation; WMATA pre-empted its subcontractors through its unilateral decision to purchase a "wrap-up" policy covering all subcontractor employees. The Court of Appeals concluded that, by pre-empting its subcontractors, WMATA acted voluntarily, and was therefore not entitled to § 5(a)'s immunity. We granted WMATA's petition for a writ of certiorari, 464 U. S. 1068 (1984), and we now reverse.

II

Workers' compensation statutes, such as the LHWCA, "provide for compensation, in the stead of liability, for a class of employees." S. Rep. No. 973, 69th Cong., 1st Sess., 16 (1926). These statutes reflect a legislated compromise between the interests of employees and the concerns of employers. On both sides, there is a *quid pro quo*. In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits. See

Morrison-Knudsen Construction Co. v. *Director, OWCP*, 461 U. S. 624, 636 (1983); *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U. S. 268, 282, and n. 24 (1980); see also 2A A. Larson, Law of Workmen's Compensation § 72.31(c) (1982).

In the case of the LHWCA, § 4(a)(b) and § 5(a) codify the compromise at the heart of workers' compensation. The relevant portions of these provisions read as follows:

> "SEC. 4. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> "(b) Compensation shall be payable irrespective of fault as a cause for the injury." 44 Stat. (part 2) 1426, 33 U. S. C. §§ 904(a), (b).
>
> "SEC. 5. (a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee . . . , except that if an employer fails to secure payment of compensation as required by this Act, an injured employee . . . may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages . . . ." 86 Stat. 1263, 33 U. S. C. § 905(a).

The current case stems from an ambiguity in the wording of these sections. It is unclear how § 5(a)'s grant of immunity applies to the contractors mentioned in § 4(a). This interpretative question divides into two distinct inquiries. First, does § 5(a)'s grant of immunity ever extend to general contractors? And second, if § 5(a) can extend to general contractors, what must a contractor do to qualify for § 5(a)'s immunity? We will consider these questions in turn.

A

The language of § 5(a)'s grant of immunity does not effortlessly embrace contractors. Section 5(a) speaks in terms of "an employer" and, at least as far as the employees of subcontractors are concerned, a general contractor does not act as an employer.

A few courts have accepted a literal reading of the language of § 5(a) and analogous state immunity provisions. For instance, in *Fiore* v. *Royal Painting Co.*, 398 So. 2d 863, 865 (1981), a Florida appellate court concluded: "Only the actual employer . . . may get under the immunity umbrella of [33 U. S. C.] § 905." Similarly, in interpreting an almost identical provision of New York workers' compensation law,[8] the New York Court of Appeals has reasoned that tort immunity should not apply to contractors because "'[t]he word "employee" denotes a contractual relationship'" and a contractor never is contractually bound to the employees of a subcontractor. *Sweezey* v. *Arc Electrical Construction Co.*, 295 N. Y. 306, 310–311, 67 N. E. 2d 369, 370–371 (1946) (quoting *Passarelli Columbia Engineering and Contracting Co.*, 270 N. Y. 68, 75, 200 N. E. 583, 585 (1936)).

The more widely held view, however, is that the term "employer" as used in § 5(a) has a statutory definition somewhat broader than that word's ordinary meaning. The majority of courts considering the issue, including the Court of Appeals in this case, have concluded that § 5(a)'s tort immunity can extend to general contractors, at least when the contractor has fulfilled its responsibilities to secure compensation for subcontractor employees in accordance with the requirements of § 4(a). See, *e. g.*, *Johnson* v. *Bechtel Associates Professional Corp.*, *supra*, at 302, 717 F. 2d, at 581; *Thomas* v. *George Hyman Construction Co.*, 173 F. Supp. 381, 383

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[8] 1922 N. Y. Laws, ch. 615, § 56; see H. R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926) ("The [LHWCA] follows in the main the New York State compensation law . . .").

(DC 1959); *DiNicola* v. *George Hyman Construction Co.*, 407 A. 2d 670, 674 (D. C. 1979).[9]

In choosing between these conflicting interpretations of § 5(a), we are predisposed in favor of the majority view that tort immunity should extend to contractors. This position is presumptively the better view because it is more consistent with the compromise underlying the LHWCA. The reward for securing compensation and assuming strict liability for worker-related injuries has traditionally been immunity from tort liability. See *supra*, at 931–932. "Since the general contractor is [by the operation of provisions like § 4(a) of the LHWCA], in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation." 2A Larson, *supra*, § 72.31(a), at 14–112.

Our only difficulty in adopting the majority view is that it requires a slightly strained reading of the word "employer." As we have repeatedly admonished courts faced with technical questions arising under the LHWCA, "the wisest course is to adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U. S. 596, 617 (1981); see *Director, OWCP* v. *Rasmussen*, 440 U. S. 29, 47 (1979). Absent convincing evidence of contrary congressional intent, we are reluctant to depart from this sound canon of statutory construction. However, upon reviewing the use of the term "employer" elsewhere in the Act, we find ample evidence to infer that Congress intended the term "employer" to include general contractors as well as direct employers.

The second sentence of § 4(a) provides that "unless the subcontractor has secured [worker's] compensation," the contractor "shall secure the payment of such compensation."

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[9] As discussed below, courts have differed as to what it means for a general contractor to secure compensation in accordance with § 4(a). See *infra*, at 936–940.

This section clearly assumes that contractors have the capacity to secure compensation for subcontractor employees. Securing compensation is a term of art in this area of law. Under the LHWCA, compensation can be secured only through the procedures outlined in § 32(a) of the LHWCA. See *supra,* at 928. However, § 32(a) speaks only of insurance being secured by an "employer." 33 U. S. C. § 932(a). Because the LHWCA requires that contractors secure compensation for subcontractor employees under certain circumstances, the term "employer" as used in § 32(a) must be read to encompass general contractors.

Similarly, under § 4(a), contractors are made liable for payment of "compensation payable under sections 7, 8, and 9." These three sections refer exclusively to employers' making payments; they contain no references to contractors. See 33 U. S. C. §§ 907(a), 908(f). For purposes of these sections as well, contractors would appear to qualify as statutory employers.

Further evidence that contractors can be employers under the LHWCA is found in § 33(b), which governs the assignment of an injured worker's right to recover damages from third parties to the worker's "employer." 33 U. S. C. § 933(b); see *Rodriguez* v. *Compass Shipping Co., supra.* It is difficult to believe that Congress did not intend for contractors making compensation payments under § 4(a) to receive assignments under § 33(b) or that Congress wanted the assignment to run to a worker's actual employer, who may never have secured any compensation insurance. Accordingly, it seems highly probable that "employer" as used in § 33(b) also covers contractors.

Finally, there are the enforcement provisions of § 38 of the Act, 33 U. S. C. § 938. It is generally assumed that contractors who fail to comply with the requirements of § 4(a) may be liable for § 38's criminal penalties. App. 263–265, 299. This assumption seems reasonable, for, if contractors are not covered by § 38, then the LHWCA contains no apparent mechanism for enforcing the second sentence of § 4(a). But, once again, § 38 refers only to "[a]ny employer required to secure the payment of compensation under this Act." If contractors are truly liable under § 38, then contractors must be considered statutory employers.

From the foregoing examples, it is clear that Congress must have meant for the term "employer" in other sections of the LHWCA to include contractors.[10] It is reasonable to infer that Congress intended the term "employer" to have that same broad meaning in § 5(a). This is particularly so inasmuch as granting tort immunity to contractors that comply with § 4(a) is consistent with the *quid pro quo* underlying workers' compensation statutes. For both of these reasons, we adopt the majority view that general contractors can be embraced by the term "employer" as used in § 5(a).

B

Having concluded that § 5(a) can cover general contractors, we now consider the conditions under which contractors may qualify for § 5(a)'s immunity. The Court of Appeals took the view that to qualify for § 5(a)'s grant of immunity, "WMATA must *first* require its subcontractors to purchase the insurance. It is only by providing compensation insurance *when the subcontractors fail to do so* that WMATA obtains immunity as a statutory employer." 230 U. S. App. D. C., at 303, 717 F. 2d, at 582 (emphasis in original). This view—

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[10] In *Probst* v. *Southern Stevedoring Co.*, 379 F. 2d 763, 767 (1967), the Fifth Circuit characterized a contractor's duty to secure compensation for subcontractor employees as "secondary, guaranty-like liability." See also *Johnson* v. *Bechtel Associates Professional Corp.*, 230 U. S. App. D. C. 297, 305, 717 F. 2d 574, 582 (1983). This characterization is apt to the extent that general contractors do not have to secure compensation for these workers "unless the subcontractor" fails to provide insurance. 33 U. S. C. § 904(a). However, this description of a contractor's duty in no way diminishes the fact that, once a statutory obligation to secure compensation attaches, the contractor must qualify as an "employer" under §§ 7, 8(f), 32(a), 33(b), and 38 in order for its obligation to make any sense under the Act.

that § 5(a) covers general contractors only if the contractor secures compensation after the subcontractor actually defaults—is consistent with the opinions of several other federal courts. See, *e. g.*, *Probst* v. *Southern Stevedoring Co.*, 379 F. 2d 763, 767 (CA5 1967); *Thomas* v. *George Hyman Construction, Co.*, 173 F. Supp., at 383.

The Court of Appeals' interpretation of the LHWCA rests on the notion that general contractors are entitled to the reward of tort immunity only when the contractor has been statutorily required to secure compensation. In essence, the Court of Appeals would withhold the *quid* of tort immunity until the contractor had been legally bound to provide the *quo* of securing compensation. Though plausible given the logic of workers' compensation statutes,[11] the Court of Appeals' view is difficult to square with the language of the LHWCA.

Section 5(a) does not say that employers are immune from tort liability if they secure compensation in accordance with the Act. The section provides just the obverse—that employers shall be immune from liability unless the employer "fails to secure payment of compensation as required by this Act." Immunity is not cast as a reward for employers that secure compensation; rather, loss of immunity is levied as a penalty on those that neglect to meet their statutory obligations.

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[11] See *supra*, at 931–932. In any workers' compensation scheme, the onus of securing compensation falls in the first instance on a worker's immediate employer, even when that employer is a subcontractor. In order to ensure that contractors do not prematurely relieve subcontractors of their responsibility for securing compensation, Congress might have tried to discourage general contractors from securing compensation unless and until a subcontractor actually defaulted on its own statutory obligation. Indeed, several States have adopted workers' compensation statutes with such a phased obligation to secure compensation. See, *e. g.*, Neb. Rev. Stat. § 48–116 (1978); Ind. Code § 22–3–2–14 (1982). Under these regimes, it might make sense to adopt the Court of Appeals' view that tort immunity should extend only to those general contractors that secure compensation after a subcontractor defaults on its obligation.

Since we have already determined that contractors qualify as employers under § 5(a), the most natural reading of § 5(a) would offer general contractors tort immunity so long as they do not fail to meet their statutory obligations to secure compensation. Under § 4(a), a contractor "shall be liable for and shall secure [compensation] unless the subcontractor has secured such payment." Contrary to the Court of Appeals' reading of the Act, this provision contains no suggestion that the contractor must make a demand on its subcontractors before securing compensation or that the contractor should forestall securing compensation until the subcontractor has affirmatively defaulted. Rather, the section simply places on general contractors a contingent obligation to secure compensation whenever a subcontractor has failed to do so. Taken together, §§ 4(a) and 5(a) would appear to grant a general contractor immunity from tort suits brought by subcontractor employees unless the contractor has neglected to secure workers' compensation coverage after the subcontractor failed to do so.

Besides being faithful to the plain language of the statute, this reading furthers the policy underlying the LHWCA, which is to ensure that workers are not deprived workers' compensation coverage. If the benefits of securing compensation insurance—that is, tort immunity—did not accrue to contractors until subcontractors had affirmatively elected to default, then contractors would be reluctant to incur the considerable expense of securing compensation insurance until they were absolutely convinced that subcontractors were in statutory default. Inevitably, such a rule would create gaps in workers' compensation coverage—a result Congress clearly wanted to avoid. The reason for passing the LHWCA was to bring one of the last remaining groups of uninsured workers under the umbrella of workers' compensation.[12]

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[12] In endorsing the LHWCA, the House Judiciary Committee recommended that "this humanitarian legislation be speedily enacted into law so

A further argument in favor of accepting the natural reading of §§4(a) and 5(a) is that it saves courts from the onerous task of determining when subcontractors have defaulted on their own statutory obligations. If a contractor's tort immunity were contingent upon an affirmative default on the part of subcontractors, then every time a subcontractor employee sued the general contractor after recovering compensation under the contractor's compensation policy, the contractor would be forced to establish that the worker's direct employer had been given a reasonable chance to secure compensation for itself and then had failed to respond to the opportunity. Nothing in the LHWCA or its legislative history suggests that Congress intended to unleash such a difficult set of factual inquiries. And it is unlikely that Congress would silently impose such a barrier to contractor immunity.[13]

As the natural reading of §§4(a) and 5(a) comports with the policies underlying the LHWCA and is consistent with the legislative history of the Act, there is no cause not to "adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U. S., at 617. We conclude, therefore, that §§4(a) and 5(a) of the LHWCA render a general

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that this class of workers, practically the only class without the benefit of workmen's compensation, may be afforded this protection, which has come to be almost universally recognized as necessary in the interest of social justice between employer and employee." H. R. Rep. No. 1190, 69th Cong., 1st Sess., 3 (1926); accord, S. Rep. No. 973, 69th Cong., 1st Sess., 16 (1926).

[13] The absence of discussion is made more telling because of industry objections to other provisions in the original LHWCA that called for companies to monitor the insurance coverage of other firms. In §38 of the 1927 Act, Congress required that before employing a stevedoring firm, the owner had to obtain a certificate proving that the firm was insured in compliance with the Act. 44 Stat. (part 2) 1442. The administrative ramifications of this provision sparked considerable debate during congressional hearings. See, *e. g.*, Compensation for Employees in Certain Maritime Employments: Hearings on S. 3170 before a Subcommittee of the Senate Judiciary Committee, 69th Cong., 1st Sess., 48, 98, 101 (1926).

contractor immune from tort liability provided the contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation. So long as general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for § 5(a)'s grant of immunity.

III

Applying our interpretation of § 4(a) and § 5(a) to the facts of this case, we conclude that WMATA was entitled to immunity from the tort actions brought by respondents. Far from "fail[ing] to secure payment of compensation as required by [the LHWCA]," 33 U. S. C. § 905(a), WMATA acted above and beyond its statutory obligations. In order to prevent subcontractor employees from going uninsured, WMATA went to the considerable effort and expense of purchasing "wrap-up" insurance on behalf of all of its subcontractors. Rather than waiting to secure its own compensation until subcontractors failed to secure, WMATA guaranteed that every Metro subcontractor would satisfy and keep satisfied its primary statutory obligation to obtain worker's compensation coverage.[14] Due to the comprehensiveness of its "wrap-up" policy, WMATA's statutory duty to secure back-up compensation for its subcontractor employees has not been triggered since the second phase of Metro construction began, and WMATA has therefore had no opportunity to default on its statutory obligations established in § 4(a). Under these circumstances, it is clear that WMATA remains entitled to § 5(a)'s grant of tort immunity.

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[14] Although the Court of Appeals left the question open, see 230 U. S. App. D. C., at 306, n. 16, 717 F. 2d, at 583, n. 16, the uncontested facts of this case establish that these subcontractors fulfilled their statutory obligation to secure compensation. WMATA bought its "wrap-up" policy "for the benefit of" the contractors. See *supra*, at 929–930. Respondents' employers contributed to WMATA's "wrap-up" policy by reducing the bids they submitted for work on the Metro project. Upon being awarded their jobs, these subcontractors received a certificate of insurance, naming them as insured parties. By thus participating in WMATA's "wrap-up" program, these subcontractors "in substance if not in form" secured compensation for purposes of § 32(a)(1) of the LHWCA. 2A A. Larson, Law of Workmen's Compensation § 67.22, pp. 12–83 (1982); accord, *Edwards* v. *Bechtel Associates Professional Corp.*, 466 A. 2d 436 (D. C.), cert. denied, 464 U. S. 995 (1983). Because these subcontractors are also "employers"

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The Court today takes a 1927 statute and reads into it the "modern view" of workers' compensation, whereby both the contractor and the subcontractor receive immunity from tort suits provided somebody secures compensation for injured employees of the subcontractor.[1] In practical terms, the result is undoubtedly good both for the construction industry

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for purposes of § 5(a) and because they have not failed to secure the compensation required by the Act, they would also appear entitled to immunity from tort liability.

[1] The Court appears to qualify the "modern view" in one respect. The Court implies that an affirmative default by the subcontractor would strip the subcontractor of its statutory immunity even if the contractor fulfilled its backup obligation to secure compensation. *Ante*, at 940–941, n. 14. In that case the contractor, but not the subcontractor, would receive immunity. Aside from the fact that this view requires precisely the difficult factual inquiry which the Court, in another portion of its opinion, *ante*, at 939, says Congress could not have intended, the result is paradoxical. Contractors will receive greater protection from suit than subcontractors under the statute even though, as the Court admits, it requires "a slightly strained reading of the word 'employer'" to grant immunity to contractors at all. Under the Court's reading, as long as anyone secures compensation for the employees of the subcontractor, the contractor is immune from a third-party tort suit. But the subcontractor receives immunity only if it itself secures the compensation, whether directly or, as here, indirectly.

and for our already congested district courts. The result may even make overall economic sense. See 2A A. Larson, Law of Workmen's Compensation § 72.31(b) (1982). But one can hardly pretend that it "adhere[s] closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U. S. 596, 617 (1981). The Court has simply fixed upon what it believes to be good policy and then patched together a rationale as best it could. Believing that it is for Congress, not this Court, to decide whether the LHWCA should be updated to reflect current thinking, I dissent.

The Court admits, as it must, that the subcontractors in this case have "secured" the payment of compensation to their employees as required by § 4(a) of the LHWCA. *Ante*, at 940–941, n. 14. The fact that those subcontractors did not each sign the check that paid for the "wrap-up" insurance policy is beside the point. The policy was purchased for their benefit, bore their names as the insured parties, and was paid for in the form of reduced bids. See App. 104, 106, 113. In subscribing to this "wrap-up" scheme, the subcontractors fulfilled their statutory obligation to secure compensation. An alternative view would not only exalt form over substance; it would also subject most of the 355 subcontractors and 2,765 sub-subcontractors working on the second phase of the Metro construction to criminal prosecution under § 38(a) merely because they did not purchase additional, wholly superfluous insurance for their employees.

The Court also admits that WMATA has *not* "secured" the payment of compensation to the employees of the subcontractors within the meaning of § 4(a). Under § 4(a), a contractor has a secondary, contingent obligation. As the Court explains, the contractor need secure compensation only when a subcontractor has failed to do so. *Ante*, at 938. Since the subcontractors in this case did not default on their statutory obligations, WMATA's secondary obligation never matured. Therefore, WMATA was not "liable for" and did not "secure" the payment of compensation under § 4(a). The fact that

WMATA "acted above and beyond its statutory obligations" by arranging for the "wrap-up" insurance, *ante*, at 940, is, thus, beside the point.[2] Because the subcontractors met their § 4(a) obligations, WMATA's duty was never triggered "and WMATA has therefore had no opportunity to default on [or to satisfy] its statutory obligations." *Ante*, at 941.

Despite these two concessions, the Court still concludes that WMATA is entitled to the immunity of § 5(a). Contractors such as WMATA are, thus, cast in the role of backup quarterbacks who get paid for sitting on the bench. They need do nothing; as long as the starting quarterbacks perform, the backups receive equal benefits.

The Court reaches this conclusion by means of a rather clumsy sleight of hand. In Part II–A, the Court argues that the term "employer" as used in the LHWCA must be capable of embracing contractors. Otherwise, when a subcontractor defaulted on its § 4(a) duty, there would be no way of enforcing or even making sense of the backup duties imposed on contractors since all the statutory provisions other than § 4(a), which flesh out the obligation imposed by that section, speak only of an "employer." In Part II–B, the Court then argues that the language of § 5(a) grants immunity to an "employer" unless the employer fails to honor its statutory duty to secure compensation. Since the statutory duty of a contractor does not even arise until the subcontractor defaults, a contractor has not failed to honor its statutory duty as long as the subcontractor secures compensation. Thus, WMATA receives the immunity of § 5(a) as an "employer" who has not "failed" in its statutory duty.

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[2] It is clear from the Court's opinion that WMATA would have received the statutory immunity of § 5(a) even if it had played no part in obtaining the "wrap-up" insurance for the subcontractors. The Court states that "§§ 4(a) and 5(a) of the LHWCA render a general contractor immune from tort liability provided the contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation." *Ante*, at 939–940. In other words, if the subcontractor secures the required insurance, the contractor need not raise a finger in order to gain the immunity of § 5(a).

The problem with this argument is that the term "employer" is given one meaning in Part II–A, but is then used in a different sense in Part II–B. That is, for purposes of the duty to secure compensation in § 4(a), a contractor is seen as only a backup "employer" who steps into that role when the subcontractor—the actual employer—defaults. But for purposes of the immunity granted in § 5(a), the Court treats a contractor as a full-fledged employer, filling that role regardless whether the subcontractor defaults or not.

Even assuming that a contractor can be an "employer" for purposes of the LHWCA,[3] a contractor at best fills that role contingently. A contractor is certainly not an "employer" of the subcontractor's employees for all purposes and at all times under the statute. Otherwise, to continue the previous metaphor, there would be two quarterbacks on the field at all times. Both the contractor and the subcontractor would be directed to make the payments required by §§ 7, 8, and 9, and both would simultaneously be entitled to the assignment of the injured worker's right to recover damages from third parties under § 33(b). Everything directed by the Act would be done in duplicate.

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[3] The Court makes a persuasive argument that the term "employer" in the LHWCA must in some circumstances be read to embrace contractors. But the argument is by no means conclusive. The definition of "employer" given in § 2(4) contains no hint that Congress intended such a reading. And in § 4(a), "employer" is used in direct contrast to "contractor." Also, § 4(a) specifically directs a contractor, upon default by the subcontractor, to secure the payment of "the compensation payable under sections 7, 8, and 9." Thus, since those three sections are incorporated by reference, the word "employer" in them need not, as the Court claims, be read to embrace contractors in order for them to give content to the contingent liability of contractors. On the other hand, it is reasonable to conclude that Congress intended contractors, upon default by subcontractors, to be subject to the enforcement provisions of § 38 and, if they secure compensation, to be entitled to the assignment of third-party tort suits under § 33(b). Those sections do speak only of an "employer." Fortunately, in my view, it is unnecessary to resolve the question in this case.

Thus, even accepting the Court's analysis in Part II–A, the most that follows is that a contractor becomes an "employer" within the meaning of the various provisions of the LHWCA when the subcontractor has defaulted on its statutory obligations. It follows that a contractor is an "employer" entitled to the immunity of § 5(a) *only* when the subcontractor has defaulted on its obligation and the contractor has stepped in to secure the payment of compensation to the subcontractor's employees.

The Court's reading of the statute, alternately contracting and expanding the term "employer," is, therefore, internally inconsistent.[4] That reading also runs counter to the settled

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[4] Aside from its "plain language" claim, the Court offers two additional arguments in favor of its reading of the statute. Neither is worth much. First, the Court argues that if contractors did not receive immunity until subcontractors had affirmatively elected to default, inevitable gaps in coverage would occur because "contractors would be reluctant to incur the considerable expense of securing compensation insurance until they were absolutely convinced that subcontractors were in statutory default." *Ante*, at 938. But that same reluctance will be present regardless of the scope of immunity afforded contractors by § 5(a). Even if they are granted immunity whenever the subcontractor secures compensation, contractors will still be reluctant to incur the "considerable expense" of securing compensation insurance unless they are sure that the subcontractors have not done so. Otherwise, the money is simply thrown away gratuitously. The Court offers no reason to believe that its tortured reading of the statutory language provides any extra incentive for contractors to obtain insurance for the employees of subcontractors. Furthermore, standard workers' compensation coverage for contractors apparently already includes backup, contingent coverage for the employees of subcontractors. The contractor only has to pay for that backup insurance if it is unable to show that the subcontractor has secured the necessary coverage. National Council on Compensation Insurance, Basic Manual for Workers' Compensation and Employers' Liability Insurance, Rule IX–C, pp. R–20–21 (3d reprint 1983). Thus, gaps in coverage are not likely to occur.

Second, the Court argues that a rule granting immunity to a contractor who secures insurance only after default by the subcontractor would principle that a provision limiting common-law rights "must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.' *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565." *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 304–305 (1959). The common-law right of the respondents in this case to maintain a negligence action against WMATA has been eliminated on what seems to me to be a less than fair reading of the statute. Accordingly, I dissent.

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require a difficult factual inquiry into whether "the worker's direct employer had been given a reasonable chance to secure compensation for itself and then had failed to respond to the opportunity." *Ante*, at 939. As noted, however, see n. 1, *supra*, the very same factual inquiry is required by the Court's own reading, which would deny immunity to defaulting subcontractors.

SECRETARY OF STATE OF MARYLAND *v.* JOSEPH H. MUNSON CO., INC.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 82–766. Argued October 31, 1983—Decided June 26, 1984

A Maryland statute prohibits a charitable organization, in connection with any fundraising activity, from paying expenses of more than 25% of the amount raised, but authorizes a waiver of this limitation where it would effectively prevent the organization from raising contributions. Respondent is a professional fundraiser whose Maryland customers include various chapters of the Fraternal Order of Police, at least one of whom was reluctant to contract with respondent because of the statute's percentage limitation. Respondent brought suit in a Maryland Circuit Court for declaratory and injunctive relief, alleging that it regularly charges an FOP chapter in excess of the 25% limitation, that petitioner Secretary of State had informed it that if it refused to comply with the statute it would be prosecuted, and that the statute violated its right to free speech under the First and Fourteenth Amendments. Without addressing petitioner's argument that respondent lacked standing to assert its claims, the Circuit Court upheld the statute, and the Maryland Court of Special Appeals affirmed. The Maryland Court of Appeals reversed, holding that respondent had standing to challenge the statute's facial validity, that the statute was unconstitutional, and that its flaws were not remedied by the waiver provision.

Held:

1. Respondent has standing to challenge the statute. Not only does respondent satisfy the "case" or "controversy" requirement of Art. III, because it has suffered both threatened and actual injury as a result of the statute, but there also is no prudential reason against allowing respondent to challenge the statute. Where the claim is that the statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claim. The activity sought to be protected is at the heart of the business relationship between respondent and its customers, and respondent's interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents. Petitioner's concern that respondent should not have standing to challenge the statute as overbroad because it has not demonstrated that the statute's overbreadth is "substantial," is more properly

reserved for the determination of respondent's challenge on the merits. Pp. 954–959.

2. Regardless of the waiver provision, the statute is unconstitutionally overbroad, its percentage restriction on charitable solicitation being an unconstitutional limitation on protected First Amendment solicitation activity. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620. Pp. 959–970.

(a) The waiver provision does not save the statute. Charitable organizations whose high solicitation and administrative costs are due to information dissemination, discussion, and advocacy of public issues, rather than to fraud, remain barred by the statute from carrying on those protected First Amendment activities. Pp. 962–964.

(b) This is not a "substantial overbreadth" case where the plaintiff must demonstrate that the statute "as applied" to him is unconstitutional. Here there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits. The statute cannot distinguish organizations that have high fundraising costs not due to protected First Amendment activities from those that have high costs due to protected activity. The flaw in the statute is not simply that it includes some impermissible applications but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. Where, as here, a statute imposes a direct restriction on protected First Amendment activity and where the statute's defect is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack. Pp. 964–968.

(c) Whether the statute regulates before- or after-the-fact is immaterial. Whether the charity is prevented from engaging in protected First Amendment activity by lack of a solicitation permit or by knowledge that its fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same. The facts that the statute restricts only fundraising expenses and not other expenses and that a charity may elect whether to be bound by its fundraising percentage for the prior year or to apply the 25% limitation on a campaign-by-campaign basis, do nothing to alter the fact that the significant fundraising activity protected by the First Amendment is barred by the percentage limitation. And the fact that the statute regulates all charitable fundraising and not just door-to-door solicitation, does not remedy the fact that the statute promotes the State's interests only peripherally. Pp. 968–970.

294 Md. 160, 448 A. 2d 935, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 970. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined, *post*, p. 975.

Diana G. Motz, Assistant Attorney General of Maryland, argued the cause for petitioner. With her on the briefs were *Stephen H. Sachs*, Attorney General, and *James G. Klair* and *Robert A. Zarnoch*, Assistant Attorneys General.

Yale L. Goldberg argued the cause for respondent. With him on the brief was *Donald E. Sinrod.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980), this Court, with one dissenting vote, concluded that a municipal ordinance prohibiting the solicitation of contributions by a charitable organization that did not use at least 75% of its receipts for "charitable purposes" was unconstitutionally overbroad in violation of the First and Fourteenth Amendments. The issue in the present case is whether a Maryland statute with a like percentage limitation, but with provisions that render it more "flexible" than the

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*A brief of *amici curiae* urging reversal was filed for the State of Connecticut et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, and *Catharine W. Hantzis, Leslie G. Espinoza*, and *Dana L. Mason*, Assistant Attorneys General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Neil F. Hartigan*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Mark Meierhenry*, Attorney General of South Dakota, and *William M. Leech, Jr.*, Attorney General of Tennessee.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Robert B. Hummel, Thomas J. McGrew, Charles S. Sims*, and *Arthur B. Spitzer;* for Independent Sector et al. by *Adam Yarmolinsky, Stephen T. Owen*, and *Michael B. Jennison;* and for Box Office, Inc., by *Barry A. Fisher, Robert C. Moest*, and *David Grosz.*

Schaumburg ordinance, can withstand constitutional attack. The Court of Appeals of Maryland concluded that, even with this increased flexibility, the percentage restriction on charitable solicitation was an unconstitutional limitation on protected First Amendment solicitation activity. We agree with that conclusion and affirm the judgment of the Court of Appeals.

I

Joseph H. Munson Co., Inc. (Munson), an Indiana corporation, instituted this action in the Circuit Court for Anne Arundel County, Md., seeking declaratory and injunctive relief against the Secretary of State of Maryland (Secretary). Munson is a professional for-profit fundraiser in the business of promoting fundraising events and giving advice to customers on how those events should be conducted. Its Maryland customers include various chapters of the Fraternal Order of Police (FOP).

Section 103A *et seq.*, Art. 41, Md. Ann. Code (1982),[1] concern charitable organizations. Section 103D prohibits such an organization, in connection with any fundraising activity, from paying or agreeing to pay as expenses more than 25% of the amount raised.[2] Munson in its complaint alleged that it

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[1] Effective July 1, 1984, the Maryland Legislature has revised its charitable organizations law. See 1984 Md. Laws, ch. 787. No changes are made in § 103D, but changes are made in the definitional section and in the registration requirement imposed on professional fundraisers. Those changes do not affect this case.

[2] Section § 103D reads in full:

"(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fundraising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations' provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay regularly charges an FOP chapter an amount in excess of 25% of the gross raised for the event it promotes. App. 4. Munson also alleged that the Secretary had informed it that it was subject to § 103D and would be prosecuted if it failed to comply with the provisions of that statute. App. 5.

In its initial complaint, filed March 7, 1978, Munson took the position that its contracts with the FOP should not be subject to § 103A *et seq.* The Circuit Court dismissed that challenge for failure to exhaust administrative remedies. The court concluded, however, that Munson could attack the statutes as an improper delegation of legislative authority, in

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or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

"The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

"(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

"(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations."

Other related Maryland statutes require that a charity intending to solicit contributions within or without the State file a registration statement with the Secretary of State providing information about its purpose and its finances, § 103B, and that professional fundraisers register with and be approved by the Secretary, § 103F. Section 103L(a) subjects both the charitable organization and the professional fundraiser to criminal liability for wilfully violating the statutory requirements.

violation of the Maryland Constitution. App. 13. Munson then amended its complaint to allege that the statutes effected an unconstitutional infringement on its right to free speech and assembly under the First and Fourteenth Amendments of the United States Constitution. *Id.*, at 26.

The Secretary questioned Munson's standing to assert its claims. He urged that § 103D is directed to acts of charitable organizations and, therefore, that only an organization of that kind can challenge the statute's constitutionality. The Secretary also urged that Munson's claims presented no actual controversy, because Munson had failed to exhaust its administrative remedies and, consequently, there had been no binding determination that the statute would apply to Munson's contracts. App. 29.

The Circuit Court did not address the standing argument, but upheld the statute on the merits. App. to Pet. for Cert. 38a. It concluded that because the statute included a provision authorizing a waiver of the percentage limitation "in those instances where the 25% limitation would effectively prevent a charitable organization from raising contributions," it was sufficiently flexible to accommodate legitimate First Amendment interests. *Id.*, at 46a. The court also rejected Munson's state-law claim that the statute was an impermissible delegation of legislative authority.

Munson appealed to the Court of Special Appeals of Maryland. The Secretary did not take a cross-appeal. The Court of Special Appeals affirmed the judgment of the Circuit Court. 48 Md. App. 273, 426 A. 2d 985 (1981).

Both Munson and the Secretary then petitioned the Court of Appeals of Maryland for writs of certiorari. Munson challenged the validity of the statute and the Secretary challenged Munson's standing. The court granted both petitions and, by a unanimous vote, reversed the judgment of the Court of Special Appeals. 294 Md. 160, 448 A. 2d 935 (1982). It expressed doubt about the Secretary's ability to challenge Munson's standing when the Secretary had not taken an appeal from the Circuit Court's judgment, but, assuming that the issue was properly before the court, nonetheless concluded that Munson did have standing to challenge the facial validity of § 103D. The court found that, based on the allegations of its complaint and under the facts as stipulated in the trial court, see App. to Pet. for Cert. 39a, Munson clearly had suffered injury as a result of § 103D.[3] The court rejected the contention that Munson may not assert the First Amendment rights of the FOP chapters, noting that where a statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship, it normally is accorded standing to challenge the validity of the statute. 294 Md., at 171, 448 A. 2d, at 941. In addition, as this Court in *Schaumburg* held, 444 U. S., at 634, "[g]iven a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." 294 Md., at 172, 448 A. 2d, at 942.

On the merits, the court concluded that *Schaumburg* required that the Maryland statute be ruled unconstitutional. It rejected the Secretary's argument that the statute was valid because it did not require a permit prior to solicitation, and imposed criminal penalties only for solicitation in violation of the statute. 294 Md., at 176–179, 448 A. 2d, at 944–945. The court also concluded that the flaws in the statute were not remedied by the provision authorizing a waiver of the 25% limitation whenever it would effectively prevent the charitable organization from raising contributions. *Id.*, at 179–181, 448 A. 2d, at 945–946. The court found that the statutory authorization for an exemption from the percentage limitation is "extremely narrow." It did not remedy the flaw inherent in a percentage limitation on solicitation costs—that charities that make a policy decision to use more than 25% of the proceeds raised for purposes other than "charitable" are denied their constitutional right to do so, and are lumped together with those engaging in fraud. *Id.*, at 180–181, 448 A. 2d, at 946. In sum, in the view of the Court of Appeals, the 25% limitation, like that in the ordinance addressed in *Schaumburg*, is not a "narrowly drawn regulatio[n] designed to serve [the State's legitimate] interests without unnecessarily interfering with First Amendment freedoms." 444 U. S., at 637.

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[3] The court also rejected the Secretary's claim that Munson could not question the validity of the statute because there had been no final administrative determination that the statute was applicable to Munson. The court concluded that Munson did not need to exhaust administrative remedies in order to attack the statute on its face. 294 Md., at 171, 448 A. 2d, at 941. The Secretary does not challenge that determination here.

We granted certiorari to review both determinations of the Court of Appeals, namely, that Munson had standing to challenge the validity of § 103D, and that the statute was unconstitutional on its face. 459 U. S. 1102 (1983).

II

Standing. The first element of the standing inquiry that Munson must satisfy in this Court is the "case" or "controversy" requirement of Art. III of the United States Constitution. *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976).[4] Munson is a professional fundraising company. Because its contracts call for payment in excess of 25% of the funds raised for a given event, it is subject, under § 103L, to civil restraint and criminal liability. Prior to initiation of the present lawsuit, the Secretary informed Munson that if it refused to comply with § 103D, it would be prosecuted. The parties stipulated before trial that the Montgomery County Chapter of the FOP was reluctant to enter into a contract with Munson because of the limitation imposed by § 103D. Munson has suffered both threatened and actual injury as a result of the statute. See *Singleton* v. *Wulff, supra; Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26 (1976); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

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[4] The Court of Appeals concluded that Munson had suffered sufficient injury as a result of § 103D to have standing to challenge the statute. The Secretary does not dispute that determination. Nevertheless, because the "case" or "controversy" requirement is jurisdictional here, we must satisfy ourselves that the requirements of Art. III are met. *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952).

In addition to the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975) (citing *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *United States* v. *Raines*, 362 U. S. 17 (1960); and *Barrows* v. *Jackson*, 346 U. S. 249 (1953)). The reason for this rule is twofold. The limitation "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy," *United States* v. *Raines*, 362 U. S., at 22, and it assures the court that the issues before it will be concrete and sharply presented.[5] See *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Munson is not a charity and does not claim that its own First Amendment rights have been or will be infringed by the challenged statute.[6] Accordingly, the Secretary insists that

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[5] As the various formulations of the prudential-standing limitations illustrate, the second factor counseling against allowing a litigant to assert the rights of third parties is not completely separable from Art. III's requirement that a plaintiff have a "sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy." *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976). The prudential limitations add to the constitutional minima a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate. See *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975); *Schlesinger* v. *Reservists To Stop the War*, 418 U. S. 208, 217–222 (1974).

[6] In the Circuit Court, Munson claimed that § 103D intruded upon its own First Amendment rights. Now, however, it focuses its argument solely on its ability to assert the First Amendment rights of Maryland char-

Munson should not be heard to complain that the State's charitable-solicitation rule violates the First Amendment.

The Secretary concedes, however, that there are situations where competing considerations outweigh any prudential rationale against third-party standing, and that this Court has relaxed the prudential-standing limitation when such concerns are present. Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 193–194 (1976).

Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption

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ities. Because of our disposition of the Secretary's standing challenge, we have no occasion to address the extent to which Munson might assert its own First Amendment right to disseminate information as part of a charitable solicitation. It is clear that the fact that Munson is paid to disseminate information does not in itself render its activity unprotected. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964).

that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).[7]

In the instant case, the Secretary's most serious argument against allowing Munson to challenge the statute is that there is no showing that a charity cannot bring its own lawsuit. Although such an argument might defeat a party's standing outside the First Amendment context, this Court has not found the argument dispositive in determining whether standing exists to challenge a statute that allegedly chills free speech. To the contrary, where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and "'with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick* v. *Oklahoma*, 413 U. S., at 612, quoting *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965). See also *Schaumburg*, 444 U. S., at 634 ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court").

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[7] See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380 (1977) ("The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted"); *Eisenstadt* v. *Baird*, 405 U. S. 438, 445 (1972) (in determining whether a litigant should be able to assert third-party rights, a crucial factor is "the impact of the litigation on the third-party interests"); *id.*, at 445, n. 5 ("Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech. *E. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). See *United States* v. *Raines*, 362 U. S. 17, 22 (1960)").

The fact that, because Munson is not a charity, there might not be a possibility that the challenged statute could restrict Munson's own First Amendment rights does not alter the analysis. Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether Munson satisfies the requirement of "injury-in-fact," and whether it can be expected satisfactorily to frame the issues in the case. If so, there is no reason that Munson need also be a charity. If not, Munson could not bring this challenge even if it were a charity.

The Secretary concedes that the Art. III case-or-controversy requirement has been met, see Tr. of Oral Arg. 5, and the Secretary has come forward with no reason why Munson is an inadequate advocate to assert the charities' rights. The activity sought to be protected is at the heart of the business relationship between Munson and its clients, and Munson's interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents. We see no prudential reason not to allow it to challenge the statute.

Besides challenging Munson's standing as a "noncharity" to bring its claim, the Secretary urges that Munson should not have standing to challenge the statute as overbroad because it has not demonstrated that the statute's overbreadth is "substantial." See *Broadrick* v. *Oklahoma*, 413 U. S., at 615. The Secretary raises a point of valid concern. The Court has indicated that application of the overbreadth doctrine is "strong medicine" that should be invoked only "as a last resort." *Id.*, at 613. The Secretary's concern, however, is one that is more properly reserved for the determination of Munson's First Amendment challenge on the merits. The requirement that a statute be "substantially overbroad" before it will be struck down on its face is a "standing" question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has no "standing" to allege that, as applied to others, the statute might be unconstitutional. See *Parker* v. *Levy*, 417 U. S. 733, 760 (1974); *United States* v. *Raines*, 362 U. S., at 21. See generally Monaghan, Overbreadth, 1981 S. Ct. Rev. 1. We therefore move on to the merits of Munson's First Amendment claim.

III

The Merits. In *Schaumburg* v. *Citizens for a Better Environment*, *supra*, the Court struck down a municipal ordinance that required every charitable organization, which utilized door-to-door solicitation, to apply for a permit obtainable only on "'[s]atisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization.'" *Id.*, at 624. The question before us is whether the distinctions between the Schaumburg ordinance and the Maryland statute are sufficient to render the statute constitutionally acceptable. To answer that question, we reexamine the bases for the conclusion the Court reached in *Schaumburg*.

A

The Court in *Schaumburg* determined first that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment:

> "Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Solicit-

> ing financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.*, at 632.[8]

Because the percentage limitation restricted the ways in which charities might engage in solicitation activity, the Court concluded that it was a "direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect." *Id.*, at 636. In addition, in order to be valid, the limitation would have to be a "narrowly drawn regulatio[n] designed to serve [the] interes[t] without unnecessarily interfering with First Amendment freedoms." *Id.*, at 637.

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[8] The types of speech regulated by the Maryland statute clearly encompass the types of speech determined in *Schaumburg* to be entitled to First Amendment protection. The statute defines "solicit" as meaning

> "to request, directly or indirectly, money, credit, property, a credit card contribution . . . or other financial assistance in any form on the plea or representation that the money, credit, property, a credit card contribution . . . or other financial assistance will be used for a charitable purpose. It includes:
>
> "(1) An oral or written request;
>
> "(2) An announcement to the news media for further dissemination by it of an appeal or campaign seeking contributions from the public for one or more charitable purposes.
>
> "(3) The distribution, circulation, posting, or publishing of any handbill, written advertisement, or other publication which, directly or by implication, seeks contributions by the public for one or more charitable purposes; and
>
> "(4) The sale of, or offer or attempt to sell, any advertisement, advertising space, book card, tag, coupon, device, magazine, membership, subscription, ticket, admission, chance, merchandise, or other tangible item in connection with which (i) an appeal is made for contributions to one or more charitable purposes, or (ii) the name of a charitable organization is used or referred to as an inducement to make such a purchase, or (iii) a statement is made that the whole or any part of the proceeds from the sale is to be used for one or more charitable purposes. A solicitation is deemed to have taken place when the request is made, whether or not the person making it actually receives a contribution." § 103A(i).

Although the Court in *Schaumburg* recognized that the Village had legitimate interests in protecting the public from fraud, crime, and undue annoyance, it rejected the limitation because it was not a precisely tailored means of accommodating those interests. The Village's asserted interests were only peripherally promoted by the limitation and could be served by measures less intrusive than a direct prohibition on solicitation.

In particular, although the Village's primary interest was in preventing fraud, the Court concluded that the limitation was simply too imprecise an instrument to accomplish that purpose. The justification for the limitation was an assumption that any organization using more than 25% of its receipts on fundraising, salaries, and overhead was not charitable, but was a commercial, for-profit enterprise. Any such enterprise that represented itself as a charity thus was fraudulent.

The flaw in the Village's assumption, as the Court recognized, was that there is no necessary connection between fraud and high solicitation and administrative costs. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment and as to which the Village had asserted no legitimate interest in prohibiting. In light of the fact that the interest in protecting against fraud can be accommodated by measures less intrusive than a direct prohibition on solicitation,[9] the Court concluded that the limitation was insufficiently related to the governmental interests asserted to justify its interference with protected speech.[10]

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[9] The Court noted, for instance, that the Village could punish fraud directly and could require disclosure of the finances of a charitable orga-

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Schaumburg left open the primary question now before this Court—whether the constitutional deficiencies in a percentage limitation on funds expended in solicitation are remedied by the possibility of an administrative waiver of the limitation for a charity that can demonstrate financial necessity. The Court there distinguished a case in which a percentage limitation on solicitation costs had been upheld, see *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), noting that under the ordinance in *Fort Worth*, a charity had the opportunity to demonstrate that its solicitation costs, though high, nevertheless were reasonable. See 444 U. S., at 635, n. 9.

Section 103D has a provision similar to that in the Fort Worth ordinance. It directs the Secretary of State to "issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." See n. 2, *supra*. Having now considered the question left open in *Schaumburg*, however, we conclude that the waiver provision does not save the statute.

The Court of Appeals concluded that the exception in § 103D was "extremely narrow," being confined to instances "where the 25% limitation would effectively prevent the char-

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nization so that a member of the public could make an informed decision about whether to contribute. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S., at 637–638.

[10] The Court also found little connection between the percentage limitation and the protection of public safety or residential privacy. Both goals were better furthered by provisions addressed directly to the asserted interest—such as a prohibition on the use of convicted felons as solicitors and a provision allowing homeowners to post signs barring solicitors from their property. *Id.*, at 638–639.

itable organization from raising contributions," 294 Md., at 180, 448 A. 2d, at 946, and of no avail to an organization whose high fundraising costs were attributable to legitimate policy decisions about how to use its funds, rather than to inability to raise funds. Under the Court of Appeals' interpretation, the Secretary has no discretion to determine that reasons other than financial necessity warrant a waiver. The statute does not help the charity whose solicitation costs are high because it chooses, as was stipulated here, see App. to Pet. for Cert. 39a, to disseminate information as a part of its fundraising. Thus, the organizations that were of primary concern to the Court in *Schaumburg*, those whose high costs were due to "'information dissemination, discussion, and advocacy of public issues,'"[11] 444 U. S., at 635, quoting from

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[11] The regulations make clear that public education activity is included in the solicitation costs regulated by the 25% limitation. Section 01.02.04.04A(3) of the Code of Maryland Regulations (1983) provides: "The expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses."

In light of the clarity of the regulation and the absence of any indication by the State that the regulation is not consistent with the statute, we can only wonder at the basis for the dissent's conclusion that § 103D(a) appears to call for a pro rata allocation between advocacy and fundraising expenses, with advocacy and education expenses exempted from the statute's reach. The statute itself gives no indication that such an exemption is envisioned. It imposes a cap on "expenses in connection with any fund-raising activity" and includes within that activity "[t]he distribution, circulation, posting, or publishing of any handbill, written advertisement, or other publication which, directly or by implication, seeks contributions by the public for one or more charitable purposes." See nn. 2 and 8, *supra*. And the State's own highest court, interpreting the reach of § 103D, apparently found no basis for a presumption that advocacy and education expenses would be exempted. In any event, while the notion of a pro rata allocation sounds appealing, it ignores the "reality," recognized by the Court in *Schaumburg*, that solicitation is intertwined with protected speech. See 444 U. S., at 632. Written materials, for example, no doubt serve both purposes. A public official would have to be charged with the responsibility of determining how expenses should be allocated, which publications should be licensed, and which restricted by the statute. See n. 12, *infra*.

Citizens for a Better Environment v. *Schaumburg*, 590 F. 2d 220, 225 (CA7 1978), remain barred by the statute from carrying on those protected First Amendment activities.[12]

C

The Secretary urges that even though there may remain charities whose First Amendment activity is limited by the statute, we should not strike down the statute on its face because, with the waiver provision, it no longer is "substantially overbroad." We are not persuaded.

"Substantial overbreadth" is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the "'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973)." *Parker* v. *Levy*, 417 U. S., at 760. See also *New York* v. *Ferber*, 458 U. S. 747, 770, n. 25 (1982). In such a case, the Court has required a litigant to demonstrate that the statute "as applied" to him is unconstitutional. *Id.*, at 774.

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[12] The Secretary disagrees with the Court of Appeals' interpretation of the scope of her discretion. She urges that she has discretion to grant a waiver "whenever necessary" and that she has done so "in an extremely liberal manner, with special care shown for the rights of advocacy groups." Brief for Petitioner 33. We have no reason to second-guess the Court of Appeals' interpretation of its own state law. But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech. See *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940); *Schneider* v. *State*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938). See also *Schaumburg*, 444 U. S., at 640–643 (dissenting opinion). Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State. Particularly where the percentage limitation itself is so poorly suited to accomplishing the State's goal, and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity.

This is not such a case.[13] Here there is no core of easily identifiable and constitutionally proscribable conduct that the

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[13] The dissenters suggest that striking down the Maryland statute on its face is a radical departure from the Court's practice and that it is done only in overbreadth cases. *Post*, at 977–978. But as the Court recognized earlier this Term, legislation repeatedly has been struck down "on its face" because it was apparent that any application of the legislation "would create an unacceptable risk of the suppression of ideas." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 797 (1984). See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938). See also *New York* v. *Ferber*, 458 U. S. 747, 768, n. 21 (1982); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Teitel Film Corp* v. *Cusack*, 390 U. S. 139 (1968); *Saia* v. *New York*, 334 U. S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State*, 308 U. S. 147 (1939); *Hague* v. *CIO*, 307 U. S. 496, 516 (1939) (plurality opinion). In those cases a litigant has claimed that his own activity was protected by the First Amendment, and the Court has not limited itself to refining the law by preventing improper applications on a case-by-case basis. Facial challenges also have been upheld in contexts other than the First Amendment. See, *e. g.*, *Kolender* v. *Lawson*, 461 U. S. 352 (1983); *Smith* v. *Goguen*, 415 U. S. 566 (1974) (vagueness challenge to criminal statute); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969)(due process challenge to garnishment statute); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939) (vagueness challenge to criminal statute). In addition, though the dissenters are loath to admit it, the State's highest court has had an opportunity to construe the statute to avoid constitutional infirmities and has been unable to do so. Cf. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 216 (1975).

The dissenters appear to overlook the fact that "overbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. *E. g.*, *New York* v. *Ferber*, *supra*. "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts statute prohibits. While there no doubt are organizations that have high fundraising costs not due to protected First Amendment activity and that, therefore, should not be heard to complain that their activities are prohibited, this statute cannot distinguish those organizations from charities that have high costs due to protected First Amendment activities. The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.[14] That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortu-

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protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. *Schaumburg*, 444 U. S., at 637–639; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978); *Zwickler* v. *Koota*, 389 U. S. 241, 250 (1967). Cf. *City Council of Los Angeles* v. *Taxpayers for Vincent*, *supra* (recognizing the validity of a facial challenge but suggesting that it should not be called "overbreadth"); *Central Hudson Gas & Electric Corp* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 565, n. 8 (1980) (same).

It was on the basis of the latter failing that the Court in *Schaumburg* struck down the Village ordinance as unconstitutional. Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands. The dissenters' efforts to chip away at the possibly impermissible applications of the statute do nothing to address the failing that the *Schaumburg* Court found dispositive—that a percentage limitation on fundraising unnecessarily restricts protected First Amendment activity.

[14] The state legislature's announced purpose in enacting the 1976 revision of the charitable organization provisions of Md. Ann. Code, Art. 41, was to "assure that contributions will be used to benefit the intended purpose." Preamble to 1976 Md. Laws, ch. 679. The State's justification therefore may be read as an interest in preventing mismanagement as well as fraud. The flaw in the statute, however, remains. The percentage limitation is too imprecise a tool to achieve that purpose.

itous.[15] It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud.

Where, as here, a statute imposes a direct restriction on protected First Amendment activity,[16] and where the defect

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[15] The Secretary's own records illustrate the tenuous connection between low fundraising costs and a valid charitable endeavor. Between October 14, 1980, and June 29, 1982, the Secretary apparently granted 13 of 16 applications for exemption from the 25% limitation. The lowest one contemplated fundraising costs of 48% of receipts. Five were between 70% and 77.1%. Another five were between 80% and 85%. Five of the applications granted were from lodges of the FOP; their solicitors were other than Munson. Exhibits to Brief for Petitioner A.6.

[16] The dissenters' suggestion that, because the Maryland statute regulates only the economic relationship between charities and professional fundraisers, it is not a direct restriction on the charities' First Amendment activity is perplexing. *Post*, at 978–980. Any restriction on the amount of money a charity can pay to a third party as a fundraising expense could be labeled "economic regulation." The fact that paid solicitors are used to disseminate information did not alter the *Schaumburg* Court's conclusion that a limitation on the amount a charity can spend in fundraising activity is a direct restriction on the charity's First Amendment rights. See 444 U. S., at 635–636. Whatever the State's purpose in enacting the statute, the fact remains that the percentage limitation is a direct restriction on the amount of money a charity can spend on fundraising activity.

For similar reasons, it is the dissent that "simply misses the point" when it urges that there is an element of "fraud" in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising. *Post*, at 980, and n. 2. The point of the *Schaumburg* Court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's "purpose" may include public education. It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack. *Schaumburg*, 444 U. S., at 637; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). See also *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 565, n. 8 (1980); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800, n. 19 (1984) ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack," citing *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 217 (1975)).

The possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect. We conclude that, regardless of the waiver provision, *Schaumburg* requires that the percentage limitation in the Maryland statute be rejected.

IV

Our conclusion is not altered by the presence of other distinctions the Secretary urges between this statute and the ordinance at issue in *Schaumburg*.

The Secretary points out, for example, that § 103D does not impose a prior restraint on protected activities. An organization may register as a charity and solicit funds without first demonstrating that it satisfies § 103D. The statute, it is said, regulates only after the fact. We are unmoved by the claimed distinction. As the Court of Appeals noted, several elements of the regulatory scheme suggest the possibil-

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charity to engage in that activity itself. And concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct.

ity of a "before-the-fact" prohibition on solicitation. Section § 103D requires that every contract or agreement between a professional fundraiser and a charitable organization shall be filed with the Secretary of State prior to any solicitation. Under § 103F, no solicitation may begin until the Secretary "shall approve the registration" of a professional fundraiser counsel or professional solicitor. And the Secretary is to approve the professional fundraiser's registration only if she finds that the application is in conformity with the requirements of the subtitle as well as the rules and regulations of the Secretary.

More important, whether the statute regulates before- or after-the-fact makes little difference in this case. Whether the charity is prevented from engaging in First Amendment activity by the lack of a solicitation permit or by the knowledge that its fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, n. 3 (1942).

The Secretary also points out that § 103D restricts only fundraising expenses and not the multitude of other expenses that are not spent directly on the organization's charitable purpose, and that the charity may elect whether to be bound by its fundraising percentage for the prior year or to apply the 25% limitation on a campaign-by-campaign basis. Those distinctions, however, mean only that the statute will not apply to as many charities as did the ordinance in *Schaumburg*. They do nothing to alter the fact that significant fundraising activity protected by the First Amendment is barred by the percentage limitation.

Finally, the fact that the statute regulates all charitable fundraising, and not just door-to-door solicitation, does not remedy the fact that the statute promotes the State's interest only peripherally. The distinction made in *Schaumburg* was between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process. The statute's aim is not improved by the fact that it fires at a number of targets.

We agree with the Court of Appeals of Maryland that § 103D is unconstitutionally overbroad. The judgment of that court therefore is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

With increasing frequency this Court seems prone to disregard the important distinctions between cases that come to us from the highest court of a State and those that arise in the federal system. The discussion of standing by the majority and the dissent illustrates the point.

What may loosely be described as the "standing" issue in this case actually encompasses three distinct questions: (1) Is the dispute between the Secretary of State of Maryland and Munson Co. a "case" or "controversy" within the meaning of Art. III of the United States Constitution; (2) are there "prudential reasons" for refusing to allow Munson to base its claim for relief on the fact that the statute is unconstitutional as it applies to the company's potential clients; and (3) is this a proper case for overbreadth analysis? The fact that this case comes to us from the Court of Appeals of Maryland is of critical significance with respect to the first two issues, but is of less importance with respect to the third. The three separate questions, however, clearly merit separate discussion.

I

Respondent unquestionably has "standing" in a jurisdictional sense. The Court appears to be unanimous on the "case" or "controversy" issue.[1] The case-or-controversy requirement, of course, relates only to the jurisdiction of this

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[1] Since the dissent does not argue that Munson lacks Art. III standing, the ode to Art. III in the dissenting opinion would seem to be totally gratuitous in what the dissent apparently agrees is a "case or controversy." The dissent does not express the opinion that the writ of certiorari should be dismissed for want of jurisdiction.

Court and has no bearing on the jurisdiction of the Maryland courts. Nothing in Art. III of the Federal Constitution prevents the Maryland Court of Appeals from rendering an advisory opinion concerning the constitutionality of Maryland legislation if it considers it appropriate to do so.[2] Thus, the decision of the Maryland Court of Appeals that it had jurisdiction to decide this case is one we have no power to review.

If we were persuaded that there is no Art. III "standing" in this case, we would have a duty to dismiss the writ of certiorari and allow the judgment of the Maryland Court of Appeals to remain in effect. No Member of the Court, however, argues that we must follow that course. Since every Member of the Court has expressed an opinion concerning the constitutionality of the Maryland law, it is difficult to perceive the relevance of the fact that the Framers of Art. III of the Federal Constitution elected not to give the federal judiciary a "roving commission" to render advisory opinions. *Post*, at 976.[3] In all events, there is little real dispute concerning standing in the jurisdictional sense.

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[2] Indeed, the Maryland Court of Appeals' discussion of standing in this case indicates it is unclear whether the issue of standing may be waived under the Maryland practice, see 294 Md. 160, 168–170, 448 A. 2d 935, 940–941 (1982), and hence suggests that the Maryland courts may be willing to render advisory opinions.

[3] At the outset of the dissenting opinion we are reminded that federal courts have no "roving commission" to survey the statute books and pass judgments on laws prematurely, and that "[m]usings" regarding the constitutionality of "hypothetical" statutes "may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom." *Post*, at 976. While there is a case or controversy concerning the validity of § 103D, which makes it a crime for a charity to pay more than 25% of the receipts from a fundraising activity on expenses, there is no case or controversy concerning a Maryland statute which "regulated only the rates charged by professional fundraisers to charitable organizations," *post*, at 981—no such Maryland statute exists. The dissent, ignoring the wisdom espoused early in its opinion, provides us with an advisory opinion on such a hypothetical statute: "The statute would be clearly constitutional." *Ibid.*

II

Whether respondent has "standing" to assert the constitutional rights of its potential customers is not a jurisdictional issue. As the Court correctly notes, in addition to the constitutional contraints on this Court's jurisdiction, this Court has "developed, for its own governance in the cases confessedly within its jurisidiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). We may require federal courts to follow those rules, but we have no power to impose them on state courts.

Thus, the rule that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties, see *ante*, at 955, *post*, at 977, is a judge made rule. Rules of that kind that we fashion for our own governance, or indeed in the exercise of our supervisory powers over other federal judges, are not necessarily applicable to the work of state judges. Those judges may, of course, elect to follow our example, but there is no reason why they must do so. Instead, I believe they are free to adopt prudential standing rules that differ from ours—and surely they may allow more latitude for third-party attacks on state laws than we might consider appropriate.

In this case, even if we might deny a fundraiser prudential standing to attack a statute on the basis of its impact on a charity in a case arising in a declaratory judgment action in federal court, the state court was perfectly willing to hear such a challenge to the Maryland statute. If we should conclude in this case that we are unwilling to listen to Munson's arguments about the impact of the Maryland statute on the rights of its clients, it surely does not follow that we can deny the Maryland Court of Appeals the power to decide that it will listen to those arguments. Thus, it seems quite clear to me that our analysis of the prudential standing issue should serve only the function of determining whether this case is one that is appropriate for the exercise of our discretionary certiorari jurisdiction.[4]

If, as the dissent implies,[5] Munson is not a proper party to advance a constitutional challenge to a statute of this type, then surely we should not review a judgment of the state court that was based on that party's arguments. In that event, the proper course would be a dismissal of the writ as having been improvidently granted.

In my opinion, while the writ of certiorari should have never issued in this case, there are sufficient reasons for finding that Munson's "third-party" standing is proper as a prudential matter that the writ does not need to be dismissed as improvidently granted. Whether a particular litigant has a sufficiently significant stake in the outcome of a constitutional challenge to a statute based on its application to individuals not before the court to render him an appropriate party to make the challenge on their behalf is a question of the degree of his interest and the nature of the relationship between him and the individuals whose rights are allegedly infringed.

Munson has been threatened with criminal sanctions under the statute, but Munson does not contend that its own First Amendment rights are violated by that threat. The fact of that threat is relevant, however, to assessing whether Munson is a proper party to litigate the constitutional question for prudential purposes. The fact that Munson has been actually, but indirectly, injured in fact by the effect of the statute on its potential clients is not enough, standing alone, to permit it to litigate the constitutionality of the statute in this Court. The Court properly recognizes that more is required and pinpoints the crucial facts that the "activity sought to be protected is at the heart of the business relationship between Munson and its clients, and Munson's interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents." *Ante*, at 958. Those factors are sufficient to assure us that Munson will vigorously litigate the question in this Court, thus providing this Court with the basis for informed decisionmaking. That is the primary prudential question for this Court in a case coming to us from a state court, which may permit third-party actions for declaratory relief that federal district courts might not necessarily entertain.

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[4] It is revealing that the dissent cites a major abstention case, *Younger* v. *Harris*, 401 U. S. 37 (1971), at the outset of its opinion discussing judicial review. *Post*, at 976. The hodgepodge of concerns expressed by the dissent with respect to entertaining this case were sound reasons for this Court to abstain from exercising our discretionary certiorari jurisdiction in this case coming from a state court, but those concerns simply do not defeat our jurisdiction to hear it nor respondent's standing to litigate it.

[5] The dissent does not argue that the writ should be dismissed as improvidently granted on the ground that this case is an unwise vehicle for adjudicating the constitutional question presented. Cf. *New York* v. *Uplinger*, *ante*, at 249 (STEVENS, J., concurring). Indeed, the dissent is perfectly willing to adjudicate the constitutionality of the statute and is quite confident that it does not violate the First Amendment.

III

Once it is determined that Munson may assert the First Amendment rights of its clients, it follows that Munson may challenge the statute on any ground that they might assert. Munson does not argue that the statute would be unconstitutional as applied to the Fraternal Order of Police, even though on this record a successful challenge on that ground would appear to redress Munson's injury. Instead, it attacks the statute on overbreadth grounds. The fact that this case comes to us from a state court is relevant to our consideration of the merits of the overbreadth challenge to some extent as well. We need not construe the statute for ourselves, compare *post*, at 984, and n. 5; the state court has authoritatively done so. That construction greatly aids an informed analysis of the merits of the First Amendment overbreadth question. The state court's judgment that the illegitimate sweep of the state statute is substantial in relationship to its legitimate applications surely merits serious consideration by this Court to the extent that issue turns on a quantitative assessment of future applications of the statute.

In summary, while I am persuaded that this Court should have declined to exercise its certiorari jurisdiction in this case—surely it had no business granting certiorari to review the determination that "Munson had standing to challenge the validity of § 103D", see *ante*, at 954—I concur in the Court's opinion.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR join, dissenting.

Four Terms ago, the Court struck down an ordinance of the Village of Schaumburg, Illinois, which prohibited "the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for 'charitable purposes,' those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses." *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 622 (1980). Today, on the authority of that decision, the Court strikes down a markedly different Maryland statute, whose primary and legitimate effect is to prohibit professional fundraisers from charging charities a fee of more than 25% of the amount raised. The Court, invoking the doctrine of "overbreadth," reaches this result not at the behest of any affected charity, but at the behest of a professional fundraising organization. Believing that in this case the overbreadth doctrine is not merely "strong medicine," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), but "bad medicine," I dissent.

Recently, this Court reaffirmed its commitment to "[t]he traditional rule" that, except in the rarest circumstances, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U. S. 747, 767 (1982).[1] This commitment is in keeping with the fact that the courts in our federal system do not have a roving commission "to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Younger* v. *Harris*, 401 U. S. 37, 52 (1971). The Constitutional Convention specifically rejected a proposal to have Members of the Supreme Court render advice concerning pending legislation. See 1 M. Farrand, Records of the Federal Convention of 1787, p. 21 (1911). And through the "case or controversy" requirement of Art. III, all federal courts are restricted to the resolution of concrete disputes between the parties before them. Musings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom.

The very power of the judiciary to declare a law unconstitutional depends upon a "flesh-and-blood" dispute in which the application of the law comes into conflict with the superior authority of the Constitution. As Chief Justice Marshall explained in *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803):

> "So if a law be in opposition to the constitution; if both the law and the constitution *apply to a particular case*, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." (Emphasis added.)

The crucial corollary of this justification for judicial review is the principle that constitutional rights are personal and may not be asserted vicariously. *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961). When a litigant challenges the constitutionality of a statute, he challenges the statute's application to him. He claims, for example, that his activities, which the statute seeks to regulate, are protected by the First Amendment. If he prevails, the Court invalidates the statute, not *in toto*, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds.

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[1] See also *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912); *Supervisors* v. *Stanley*, 105 U. S. 305, 311–315 (1882); *Austin* v. *The Aldermen*, 7 Wall. 694, 698–699 (1869).

A successful overbreadth challenge, on the other hand, suspends enforcement of a statute entirely. The interests underlying the law, however substantial, are simply negated until the statute is either rewritten by the legislature or "reinterpreted" by an authorized court to serve those interests more narrowly. The litigant is permitted to raise the rights of third parties not before the court in order to forestall even legitimate applications of the law.

The advantages of the first approach are obvious. It is less intrusive on the legislative prerogative and less disruptive of state policy to limit the permitted reach of a statute only on a case-by-case basis. Such restraint also allows state courts the opportunity to construe a law to avoid constitutional infirmities. *New York* v. *Ferber*, *supra*, at 768. Finally, the decision itself is likely to be more sound when based on data relevant and adequate to an informed judgment. The facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide. "Facts and facts again are decisive." Frankfurter & Landis, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005 (1924).

One might as a matter of original inquiry question whether an overbreadth challenge should ever be allowed, given that the Declaratory Judgment Act and the availability of preliminary injunctive relief will usually permit a litigant to discover the scope of constitutional protection afforded his activity without subjecting himself to criminal prosecution. Be that as it may, however, our cases at least indicate that the doctrine is to be used sparingly. "[W]e have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" *New York* v. *Ferber, supra,* at 769 (quoting *Broadrick* v. *Oklahoma,* 413 U. S., at 613). We have insisted that the overbreadth of a statute be "substantial" in relation to its legitimate sweep before the statute will be invalidated on its face. "[P]articularly where conduct and not merely speech is involved," *Broadrick, supra,* at 615, we are hesitant to paralyze the legitimate enforcement efforts of the States based solely on predictions as to potential chill.

These considerations apply with special force in this case. The challenged Maryland statute functions primarily as an economic regulation setting a limit on the fees charged by professional fundraisers. The purpose and effect of the statute are, therefore, altogether different from those of the Village ordinance invalidated in *Schaumburg, supra.* Schaumburg's ordinance provided that "[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit." Schaumburg Village Code, Ch. 22, Art. III, § 22–20 (1975). The application for that permit was required to contain "[s]atisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." § 22–20(g). Excluded from the definition of "charitable purpose" were all solicitation expenses, salaries, overhead, and other administrative expenses. *Ibid.*

Thus, Schaumburg's ordinance was primarily directed at controlling the nature and internal workings of charitable organizations seeking to solicit in the Village, and its prime failing was that it effectively prohibited any solicitation by "organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out those functions as well as to solicit financial support." *Schaumburg*, 444 U. S., at 636. Such advocacy organizations are likely to have high administrative expenses which would make it impossible for them to qualify for a permit.

Maryland's statute, on the other hand, is primarily directed at controlling the external, economic relations between charities and professional fundraisers. Such fundraisers are required by § 103F to register with the Secretary, furnish certain information, pay an annual fee, file a bond and, most important of all, comply with the requirements of the subtitle, including § 103D. Section § 103D provides in relevant part:

> "(a) A charitable organization . . . may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. . . ."

As to Munson and other professional fundraisers who are not themselves engaged in speech activities, § 103D, read in conjunction with § 103F, is merely an economic regulation controlling the fees the firm is permitted to charge. A similar regulation governing, for example, the fees charged by an employment agency would be judged and approved under the minimum rationality standard traditionally applied to economic regulations. See, *e. g.*, *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 460 (1978); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). Of course, a ceiling on the fees charged by professional fundraisers may have an incidental and indirect impact on protected expression—as would, for example, a ceiling placed on the fees charged by literary agents—in that marginal producers could be forced out of the market. In other words, price controls might tend to make these services less available, much as rent control is thought to make rental housing less available. But such an indirect and incidental impact on expression is not sufficient to subject such regulation to strict First Amendment scrutiny. Otherwise, national forest legislation would be equally suspect as tending to raise the price and limit the quantity of paper.

Even if limitations on the fees charged by professional fundraisers were subjected to heightened scrutiny, however, those limitations serve a number of legitimate and substantial governmental interests. They insure that funds solicited from the public for a charitable purpose will not be excessively diverted to private pecuniary gain. In the process, they encourage the public to give by allowing the public to give with confidence that money designed for a charity will be spent on charitable purposes. The legislature could conclude that fees charged by professional fundraisers must be kept within moderate limits to coincide with the contributors' expectations that their contributions will go primarily to the charitable purpose. There is an element of "fraud" in soliciting money "for" a charity when in reality that charity will see only a small fraction of the funds collected.[2] But even if a fundraiser were to fully disclose to every donor that half of the money collected would be used for "expenses," so that there could be no question of "fraud" in the common-law sense of that word, the State's interest is not at an end. The statute, as the Court concedes, is also directed against the incurring of excessive costs in charitable solicitation even where the costs are fully disclosed to both potential donors and the charity. Such a law protects the charities themselves from being overcharged by unscrupulous professional fundraisers.

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[2] The Court simply misses the point when it dismisses this legitimate interest with the observation that "there is nothing in the percentage limitation that prevents [an organization] from misdirecting funds." *Ante*, at 967. The concern is not that someone may abscond to South America with the funds collected. Rather, a high fundraising fee itself betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited.

The Court, therefore, is simply mistaken when it claims that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Ante,* at 965–966. The rates charged by professional fundraisers are in fact both "easily identifiable" and "constitutionally proscribable." If Maryland's statute regulated only the rates charged by professional fundraisers to charitable organizations, this would be an easy case. The statute would be clearly constitutional.

But of course the statute also applies to solicitation expenses other than those spent on professional fundraisers. To that extent, therefore, the statute directly regulates the solicitation activities of charities and is subject to more intense scrutiny. *Schaumburg, supra,* at 632. Even as applied directly to charities, however, the statute serves legitimate objectives insofar as it regulates fundraising costs not attributable to public education or advocacy. Again, donor confidence is enhanced by such a regulation, and the intended objects of the public's bounty are benefited. The real question before the Court, then, is whether the overbreadth of the statute—the extent to which it might infringe on constitutionally protected expression—is substantial judged in relation to the statute's plainly legitimate sweep. *Broadrick* v. *Oklahoma,* 413 U. S., at 615.

The Court today echoes the concern of *Schaumburg* that some charities will incur fundraising costs higher than the 25% limitation not because the costs are essential to fundraising, but because the charity seeks to raise funds in a manner that serves other educational and advocacy goals. See *ante,* at 963–964. Unlike *Schaumburg,* however, it is not at all clear that the Court's concern is well founded in this case. In baldly claiming that advocacy organizations "remain barred by the statute from carrying on those protected First Amendment activities," *ante,* at 964, the Court simply ignores or slights some crucial differences between this statute and the ordinance at issue in *Schaumburg.*

First of all, administrative and overhead costs that are not attributable to fundraising are not included in the 25% calculation of § 103D(a). Thus, the salaries of researchers, policymakers and technical support staff, as well as general overhead expenses, do not count as fundraising costs. "[O]rganizations that spend large amounts on salaries and administrative expenses," *Schaumburg*, 444 U. S., at 638, will therefore be largely unaffected by the statute. To take but one obviously pertinent example, Citizens for a Better Environment, the plaintiff in *Schaumburg*, reportedly spent 23.3% of its income on fundraising in 1975 and 21.5% on administration. In 1976, these figures were 23.3% and 16.5%, respectively. *Id.*, at 626. Thus, although that organization was prohibited from soliciting door-to-door by the Village ordinance in *Schaumburg*, it would be readily accommodated by Maryland's more carefully drawn statute.

Second, § 103D(b) specifically excludes from the definition of fundraising costs many of the costs associated with combined advocacy and fundraising activities. The section provides:

> "(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs."

Thus, unlike the ordinance in *Schaumburg*, the costs of receptions, picnics and other social events at which advocacy organizations seek converts are not included in the fundraising calculus. Nor are costs associated with printing and mailing advocacy literature. Again, the statute is more carefully designed to accommodate the protected expression of such organizations. Sections 103D(a) and (b) together largely eliminate the concerns of *Schaumburg*.

Third, § 103D(a) directs the Secretary to "issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." The Maryland Court of Appeals has said that this waiver provision is "extremely narrow," but it should still suffice to alleviate the Court's concern that "unpopular" charities will be precluded from soliciting. *Ante*, at 967. A charity unable to meet the 25% limit due to the unpopularity of its cause would clearly be entitled to a statutory exemption.[3]

Finally, even for those activities which mingle fundraising and advocacy, but do not fall within the exceptions of § 103D(b), § 103D(a) appears to call for a pro rata allocation of expenses into those expenses attributable to the fundraising portion of the activity and those attributable to the advocacy portion.

> "The Secretary of State shall, by rule or regulation in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations' provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which

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[3] The Court itself acknowledges that "[t]he possibility of a waiver may decrease the number of impermissible applications of the statute," but feels that this fact "does nothing to remedy the statute's fundamental defect." *Ante*, at 968. As noted, however, the Court simply ignores the extent to which the statute directly and legitimately regulates both the fees charged by professional fundraisers and those fundraising costs not attributable to public education or advocacy. Properly viewed, any decrease in the number of impermissible applications of the statute is extremely significant as tending to decrease overbreadth in relation to the statute's legitimate sweep.

> are in connection with a fund-raising activity and those which are not."

If such a pro rata allocation is required by the statute, then expenses associated with door-to-door solicitation by a member of the organization,[4] which involves advocacy and education as well as an appeal for financial support, could not be charged entirely to fundraising.[5] If that is correct, the statute is not overbroad at all. Expenses associated with advocacy and public education would be completely excluded from the fundraising calculus. The crucial point is that we cannot know precisely how such activities will be accommodated unless we first give Maryland a chance to face the question in concrete situations.

It would be foolish to claim that these four statutory safeguards will ensure that the statute will never be applied in such a way as to improperly inhibit the protected expression of any advocacy organization. No statute bears an absolute guarantee that it will always be applied within constitutional bounds; consequently, no such guarantee can be demanded. The question before the Court, we must remember, is whether the likely overbreadth of the statute is *substantial* in relation to its legitimate sweep.

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[4] The statute specifically excludes from the definition of professional fundraiser a "bona fide salaried officer or employee of a charitable organization which maintains a permanent office in the State." § 103A(g).

[5] The Court rightly points out, *ante*, at 963, n. 11, that one of the Secretary's regulations provides that any public education activity which includes "an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses." Code of Maryland Regulations § 01.02.04.04A(3) (1983). But that regulation is not necessarily consistent with the statutory scheme. It has yet to be tested and we therefore do not know if it would be upheld by the Maryland courts. At any rate, possible constitutional failings in the regulations passed pursuant to a statute do not form a basis for holding the statute itself unconstitutional. A far less drastic solution would be, in an appropriate case, to strike down the regulation.

The differences noted above between this statute and the ordinance condemned in *Schaumburg* serve to minimize any potential overbreadth. And given the extensive legitimate application of this statute, both to fundraising expenses not attributable to public education or advocacy and to the fees charged by professional fundraisers who, like Munson, are not themselves engaged in advocating any causes, I see no basis for concluding that the Maryland statute is substantially overbroad. Nor does the Court offer any reason to so believe. As noted, the Court simply misunderstands the primary purpose and effect of the statute and then proceeds to speculate about how it might be improperly applied. Unfortunately, such misunderstanding and ungrounded speculation are the natural hazards of overbreadth analysis. When the Court's sights are not focused on the actual application of a statute to a specific set of facts, its vision proves sadly deficient.

I dissent.

RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* MONSANTO CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

No. 83–196. Argued February 27, 1984—Decided June 26, 1984

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a covered product (hereinafter pesticide) in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data. Under the data-consideration provisions of § 3, as amended in 1978, applicants now are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978, while all other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. If the parties cannot agree on the amount of compensation, either may initiate a binding arbitration proceeding, and if an original submitter refuses to participate in negotiations or arbitration, he forfeits his claim for compensation. Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. Section 10, as amended in 1978, authorizes, in general, public disclosure of all health, safety, and environmental data even though it may result in disclosure of trade secrets. Appellee, a company headquartered in Missouri, is an inventor, producer, and seller of pesticides, and invests substantial sums in developing active ingredients for pesticides and in producing end-use products that combine such ingredients with inert ingredients. Appellee brought suit in Federal District Court for injunctive and declaratory relief, alleging, *inter alia*, that the data-consideration and data-disclosure provisions of FIFRA effected a "taking" of property without just compensation, in violation of the Fifth Amendment, and that the data-consideration provisions violated the Amendment because they effected a taking of property for a private, rather than a public, purpose. The District Court held that the challenged provisions of FIFRA are unconstitutional, and permanently enjoined EPA from implementing or enforcing those provisions.

Held:

1. To the extent that appellee has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment. Despite their intangible nature, trade secrets have many of the characteristics of more traditional forms of property. Moreover, this Court has found other kinds of intangible interests to be property for purposes of the Clause. Pp. 1000–1004.

2. EPA's consideration or disclosure of data submitted by appellee prior to October 22, 1972, or after September 30, 1978, does not effect a taking, but EPA's consideration or disclosure of certain health, safety, and environmental data constituting a trade secret under state law and submitted by appellee between those two dates may constitute a taking under certain conditions. Pp. 1004–1014.

(a) A factor for consideration in determining whether a governmental action short of acquisition or destruction of property has gone beyond proper "regulation" and effects a "taking" is whether the action interferes with reasonable investment-backed expectations. With respect to any health, safety, and environmental data that appellee submitted to EPA after the effective date of the 1978 FIFRA amendments (October 1, 1978), appellee could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. As long as appellee is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the economic advantages of a registration can hardly be called a taking. Pp. 1005–1008.

(b) Prior to its amendment in 1972 (effective October 22, 1972), FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Although the Trade Secrets Act provides a criminal penalty for a Government employee who discloses, in a manner not authorized by law, any trade-secret information revealed to him during the course of his official duties, it is not a guarantee of confidentiality to submitters of data, and, absent an express promise, appellee had no reasonable, investment-backed expectation that its information submitted to EPA before October 22, 1972, would remain inviolate in the EPA's hands. The possibility was substantial that the Federal Government at some future time would find disclosure to be in the public interest. *A fortiori*, the Trade Secrets Act, which penalizes only unauthorized disclosure, cannot be construed as any sort of assurance against internal agency use of submitted data during consideration of the application of a subsequent applicant for registration. Pp. 1008–1010.

(c) However, under the statutory scheme in effect between October 22, 1972, and September 30, 1978, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. The explicit governmental guarantee to registration applicants of confidentiality and exclusive use with respect to trade secrets during this period formed the basis of a reasonable investment-backed expectation. If EPA, consistent with current provisions of FIFRA, were now to disclose such trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, its actions would frustrate appellee's reasonable investment-backed expectation. If, however, arbitration pursuant to FIFRA were to yield just compensation for the loss in the market value of appellee's trade-secret data suffered because of EPA's consideration of the data in connection with another application (no arbitration having yet occurred), then appellee would have no claim against the Government for a taking. Pp. 1010–1014.

3. Any taking of private property that may occur in connection with EPA's use of data submitted to it by appellee between October 22, 1972, and September 30, 1978, is a taking for a "public use," rather than for a "private use," even though subsequent applicants may be the most direct beneficiaries. So long as a taking has a conceivable public character, the means by which it will be attained is for Congress to determine. Congress believed that the data-consideration provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Such a procompetitive purpose is within Congress' police power. With regard to FIFRA's data-disclosure provisions, the optimum amount of disclosure to assure the public that a product is safe and effective is to be determined by Congress, not the courts. Pp. 1014–1016.

4. A Tucker Act remedy is available to provide appellee with just compensation for any taking of property that may occur as a result of FIFRA's data-consideration and data-disclosure provisions, and thus the District Court erred in enjoining EPA from acting under those provisions. Neither FIFRA nor its legislative history discusses the interaction between FIFRA and the Tucker Act, and inferring a withdrawal of Tucker Act jurisdiction would amount to a disfavored partial repeal by implication of the Tucker Act. FIFRA's provision that an original submitter of data forfeits his right to compensation from a later submitter for the use of the original submitter's data if he fails to participate in, or comply with the terms of, a negotiated or arbitrated

compensation settlement merely requires a claimant to first seek satisfaction through FIFRA's procedure before asserting a Tucker Act claim. Pp. 1016–1019.

5. Because the Tucker Act is available as a remedy for any uncompensated taking appellee may suffer as a result of the operation of the challenged provisions of FIFRA, appellee's challenges to the constitutionality of the arbitration and compensation scheme of FIFRA are not ripe for resolution. Pp. 1019–1020.

564 F. Supp. 552, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in which O'CONNOR, J., joined, except for Part IV–B and a statement on p. 1013. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 1021. WHITE, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Wallace argued the cause for appellant. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Liotta*, *Deputy Assistant Attorney General Walker*, *Jerrold J. Ganzfried*, *Raymond N. Zagone*, *Anne S. Almy*, and *John A. Bryson*.

A. Raymond Randolph, Jr., argued the cause for appellee. With him on the briefs were *David G. Norrell*, *Thomas O. Kuhns*, *W. Wayne Withers*, *Frederick A. Provorny*, *Gary S. Dyer*, *C. David Barrier*, and *Kenneth R. Heineman*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Association for the Advancement of Science et al. by *Thomas O. McGarity;* for the American Federation of Labor and Congress of Industrial Organizations et al. by *Marsha S. Berzon*, *Michael Rubin*, *Laurence Gold*, *Albert H. Meyerhoff*, and *J. Albert Woll;* for the Pesticide Producers Association et al. by *David B. Weinberg* and *William R. Weissman;* and for PPG Industries, Inc., by *Thomas H. Truitt*, *David R. Berz*, and *Jeffrey F. Liss.*

Briefs of *amici curiae* urging affirmance were filed for Abbott Laboratories et al. by *Kenneth W. Weinstein* and *Lawrence S. Ebner;* for the American Chemical Society et al. by *William J. Butler, Jr.*, and *Arthur D. McKey;* for the American Patent Law Association, Inc., by *Donald S. Chisum;* for Avco Corp. by *Alvin D. Shapiro;* for Sathon, Inc., by *Ralph E. Brown* and *Mark E. Singer;* for SDS Biotech Corp. et al. by *Harold Himmelman* and *Cynthia A. Lewis;* and for Stauffer Chemical Co. by *Lawrence S. Ebner*, *John T. Ronan III*, and *John W. Behan.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we are asked to review a United States District Court's determination that several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U. S. C. § 136 *et seq.*, are unconstitutional. The provisions at issue authorize the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a pesticide[1] in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data.

I

Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture. See S. Rep. No. 95–334, p. 32 (1977); S. Rep. No. 92–838, pp. 3–4, 6–7 (1972); H. R. Rep. No. 92–511, pp. 3–7 (1971). While pesticide use has led to improvements in productivity, it has also led to increased risk of harm to humans and the environment. See S. Rep. No. 92–838, at 3–4, 6–7; H. R. Rep. No. 92–511, at 3–7. Although the Federal Government has regulated pesticide use for nearly 75 years,[2] FIFRA was first adopted in 1947. 61 Stat. 163.

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[1] For purposes of our discussion of FIFRA, the term "pesticides" includes herbicides, insecticides, fungicides, rodenticides, and plant regulators. See §§ 2(t) and (u) of FIFRA, as amended, 7 U. S. C. §§ 136(t) and (u).

[2] The first federal legislation in this area was the Insecticide Act of 1910, 36 Stat. 331, which made it unlawful to manufacture and sell insecticides that were adulterated or misbranded. In 1947, the 1910 legislation was repealed and replaced with FIFRA. 61 Stat. 172.

Some States had undertaken to regulate pesticide use before there was federal legislation, and many more continued to do so after federal legislation was enacted. In 1946, the Council of State Governments recommended for adoption a model state statute, the Uniform State Insecticide, Fungicide, and Rodenticide Act. See S. Rep. No. 92–838, p. 7 (1972); H. R. Rep. No. 313, 80th Cong., 1st Sess., 3 (1947).

As first enacted, FIFRA was primarily a licensing and labeling statute. It required that all pesticides be registered with the Secretary of Agriculture prior to their sale in interstate or foreign commerce. §§ 3(a) and 4(a) of the 1947 Act, 61 Stat. 166–167. The 1947 legislation also contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including directions for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product. §§ 2(u)(2) and 3(a)(3).

Upon request of the Secretary, an applicant was required to submit test data supporting the claims on the label, including the formula for the pesticide. §§ 4(a) and (b). The 1947 version of FIFRA specifically prohibited disclosure of "any information relative to formulas of products," §§ 3(c)(4) and 8(c), but was silent with respect to the disclosure of any of the health and safety data submitted with an application.[3]

In 1970, the Department of Agriculture's FIFRA responsibilities were transferred to the then newly created Environmental Protection Agency, whose Administrator is the appellant in this case. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), 5 U. S. C. App., p. 1132.

Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, see S. Rep. No. 92–838, at 3–9; S. Rep. No. 92–970, p. 9 (1972); H. R. Rep. No. 92–511, at 5–13, Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. H. R. Rep. No. 92–511, at 1. As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority. Congress also added a new criterion for registration: that EPA determine that the pesticide will not cause "unreasonable adverse effects on the environment." §§ 3(c)(5)(C) and (D), 86 Stat. 980–981.

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[3] Appellant here concedes, however, that as a matter of practice, the Department of Agriculture did not publicly disclose the health and safety information. Brief for Appellant 5, n. 5.

For purposes of this litigation, the most significant of the 1972 amendments pertained to the pesticide-registration procedure and the public disclosure of information learned through that procedure. Congress added to FIFRA a new section governing public disclosure of data submitted in support of an application for registration. Under that section, the submitter of data could designate any portions of the submitted material it believed to be "trade secrets or commercial or financial information." § 10(a), 86 Stat. 989. Another section prohibited EPA from publicly disclosing information which, in its judgment, contained or related to "trade secrets or commercial or financial information." § 10(b). In the event that EPA disagreed with a submitter's designation of certain information as "trade secrets or commercial or financial information" and proposed to disclose that information, the original submitter could institute a declaratory judgment action in federal district court. § 10(c).

The 1972 amendments also included a provision that allowed EPA to consider data submitted by one applicant for registration in support of another application pertaining to a similar chemical, provided the subsequent applicant offered to compensate the applicant who originally submitted the data. § 3(c)(1)(D). In effect, the provision instituted a mandatory data-licensing scheme. The amount of compensation was to be negotiated by the parties, or, in the event negotiations failed, was to be determined by EPA, subject to judicial review upon the instigation of the original data submitter. The scope of the 1972 data-consideration provision, however, was limited, for any data designated as "trade secrets or commercial or financial information" exempt from disclosure under § 10 could not be considered at all by EPA to support another registration application unless the original submitter consented. *Ibid.*

The 1972 amendments did not specify standards for the designation of submitted data as "trade secrets or commercial or financial information." In addition, Congress failed to designate an effective date for the data-consideration and disclosure schemes. In 1975, Congress amended § 3(c)(1)(D) to provide that the data-consideration and data-disclosure provisions applied only to data submitted on or after January 1, 1970, 89 Stat. 755, but left the definitional question unanswered.

Much litigation centered around the definition of "trade secrets or commercial or financial information" for the purposes of the data-consideration and data-disclosure provisions of FIFRA. EPA maintained that the exemption from consideration or disclosure applied only to a narrow range of information, principally statements of formulae and manufacturing processes. In a series of lawsuits, however, data-submitting firms challenged EPA's interpretation and obtained several decisions to the effect that the term "trade secrets" applied to any data, including health, safety, and environmental data, that met the definition of trade secrets set forth in Restatement of Torts § 757 (1939). See, *e. g.*, *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (WD Mo. 1978); *Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (ND Cal. 1978). These decisions prevented EPA from disclosing much of the data on which it based its decision to register pesticides and from considering the data submitted by one applicant in reviewing the application of a later applicant. See S. Rep. No. 95–334, at 7; H. R. Rep. No. 95–663, p. 18 (1977).

Because of these and other problems with the regulatory scheme embodied in FIFRA as amended in 1972, see S. Rep.

No. 95–334, at 2–5; H. R. Rep. No. 95–663, at 15–21; see generally EPA Office of Pesticide Programs, FIFRA: Impact on the Industry (1977), reprinted in S. Rep. No. 95–334, at 34–68, Congress enacted other amendments to FIFRA in 1978. These were effected by the Federal Pesticide Act of 1978, 92 Stat. 819. The new amendments included a series of revisions in the data-consideration and data-disclosure provisions of FIFRA's §§ 3 and 10, 7 U. S. C. §§ 136a and 136h.

Under FIFRA, as amended in 1978, applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii).[4] If the parties cannot agree on the amount of

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[4] Section 3(c)(1)(D), 92 Stat. 820–822, 7 U. S. C. § 136a(c)(1)(D), reads in relevant part:

"(i) With respect to pesticides containing active ingredients that are initially registered under this Act after [September 30, 1978], data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide . . . ;

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person . . . within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, compensation, either may initiate a binding arbitration proceeding. The results of the arbitration proceeding are not subject to judicial review, absent fraud or misrepresentation. The same statute provides that an original submitter who refuses to participate in negotiations or in the arbitration proceeding forfeits his claim for compensation. Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii).

Also in 1978, Congress added a new subsection, § 10(d), 7 U. S. C. § 136h(d), that provides for disclosure of all health,

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or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. . . . [T]he findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. . . . If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. . . . Registration action by the Administrator shall not be delayed pending the fixing of compensation;

"(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data."

safety, and environmental data to qualified requesters, notwithstanding the prohibition against disclosure of trade secrets contained in § 10(b). The provision, however, does not authorize disclosure of information that would reveal "manufacturing or quality control processes" or certain details about deliberately added inert ingredients unless "the Administrator has first determined that the disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." §§ 10(d)(1)(A) to (C).[5] EPA may not disclose data to representatives of foreign or multinational pesticide companies unless the original submitter of the data consents to the disclosure. § 10(g). Another subsection establishes a criminal penalty for wrongful disclosure by a Government employee or contractor of confidential or trade secret data. § 10(f).

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[5] Section 10(d), 92 Stat. 830, reads in relevant part:

"(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans, and other mammals, plants, animals, and soil, and studies on persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: *Provided*, That the use of such data for any registration purpose shall be governed by section 3 of this Act: *Provided further*, That this paragraph does not authorize the disclosure of any information that—

"(A) discloses manufacturing or quality control processes,

"(B) discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately added inert ingredients of a pesticide, or

"(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide,

unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

"(2) Information concerning production, distribution, sale, or inventories of a pesticide that is otherwise entitled to confidential treatment under subsection (b) of this section may be publicly disclosed in connection with a public proceeding to determine whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment, if the Administrator determines that such disclosure is necessary in the public interest."

II

Appellee Monsanto Company (Monsanto) is an inventor, developer, and producer of various kinds of chemical products, including pesticides. Monsanto, headquartered in St. Louis County, Mo., sells in both domestic and foreign markets. It is one of a relatively small group of companies that invent and develop new active ingredients for pesticides and conduct most of the research and testing with respect to those ingredients.[6]

These active ingredients are sometimes referred to as "manufacturing-use products" because they are not generally sold directly to users of pesticides. Rather, they must first be combined with "inert ingredients"—chemicals that dissolve, dilute, or stabilize the active components. The results of this process are sometimes called "end-use products," and the firms that produce end-use products are called "formulators." See the opinion of the District Court in this case, *Monsanto Co.* v. *Acting Administrator, United States Environmental Protection Agency*, 564 F. Supp. 552, 554 (ED Mo. 1983). A firm that produces an active ingredient may use it for incorporation into its own end-use products, may sell it to formulators, or may do both. Monsanto produces both active ingredients and end-use products. *Ibid.*

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[6] A study by the Office of Pesticide Programs of the EPA showed that in 1977 approximately 400 firms were registered to produce manufacturing-use products. S. Rep. No. 95–334, p. 34 (1977). It was estimated that the 10 largest firms account for 75% of this country's pesticide production. *Id.*, at 60. A correspondingly small number of new pesticides are marketed each year. In 1974, only 10 new pesticides were introduced. See Goring, The Costs of Commercializing Pesticides, International Conference of Entomology, Aug. 20, 1976, reprinted in Hearings on Extension of the Federal Insecticide, Fungicide, and Rodenticide Act before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture, Nutrition, and Forestry, 95th Cong., 1st Sess., 250, 254 (1977).

The District Court found that development of a potential commercial pesticide candidate typically requires the expenditure of $5 million to $15 million annually for several years. The development process may take between 14 and 22 years, and it is usually that long before a company can expect any return on its investment. *Id.*, at 555. For every manufacturing-use pesticide the average company finally markets, it will have screened and tested 20,000 others. Monsanto has a significantly better-than-average success rate; it successfully markets 1 out of every 10,000 chemicals tested. *Ibid.*

Monsanto, like any other applicant for registration of a pesticide, must present research and test data supporting its application. The District Court found that Monsanto had incurred costs in excess of $23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA. *Id.*, at 560. The information submitted with an application usually has value to Monsanto beyond its instrumentality in gaining that particular application. Monsanto uses this information to develop additional end-use products and to expand the uses of its registered products. The information would also be valuable to Monsanto's competitors. For that reason, Monsanto has instituted stringent security measures to ensure the secrecy of the data. *Ibid.*

It is this health, safety, and environmental data that Monsanto sought to protect by bringing this suit. The District Court found that much of these data "contai[n] or relat[e] to trade secrets as defined by the Restatement of Torts and Confidential, commercial information." *Id.*, at 562.

Monsanto brought suit in District Court, seeking injunctive and declaratory relief from the operation of the data-consideration provisions of FIFRA's § 3(c)(1)(D), and the data-disclosure provisions of FIFRA's § 10 and the related § 3(c)(2)(A). Monsanto alleged that all of the challenged provisions effected a "taking" of property without just compensation, in violation of the Fifth Amendment. In addition, Monsanto alleged that the data-consideration provisions violated the Amendment because they effected a taking of property for a private, rather than a public, purpose. Finally, Monsanto alleged that the arbitration scheme provided by § 3(c)(1)(D)(ii) violates the original submitter's due process rights and constitutes an unconstitutional delegation of judicial power.

After a bench trial, the District Court concluded that Monsanto possessed property rights in its submitted data, specifically including the right to exclude others from the enjoyment of such data by preventing their unauthorized use and by prohibiting their disclosure. 564 F. Supp., at 566. The court found that the challenged data-consideration provisions "give Monsanto's competitors a free ride at Monsanto's expense." *Ibid.* The District Court reasoned that § 3(c)(1)(D) appropriated Monsanto's fundamental right to exclude, and that the effect of that appropriation is substantial. The court further found that Monsanto's property was being appropriated for a private purpose and that this interference was much more significant than the public good that the appropriation might serve. 564 F. Supp., at 566–567.

The District Court also found that operation of the disclosure provisions of FIFRA constituted a taking of Monsanto's property. The cost incurred by Monsanto when its property is "permanently committed to the public domain and thus effectively destroyed" was viewed by the District Court as significantly outweighing any benefit to the general public from having the ability to scrutinize the data, for the court seemed to believe that the general public could derive all the assurance it needed about the safety and effectiveness of a pesticide from EPA's decision to register the product and to approve the label. *Id.*, at 567, and n. 4.

After finding that the data-consideration provisions operated to effect a taking of property, the District Court found that the compulsory binding-arbitration scheme set forth in § 3(c)(1)(D)(ii) did not adequately provide compensation for the property taken. The court found the arbitration provision to be arbitrary and vague, reasoning that the statute does not give arbitrators guidance as to the factors that enter into the concept of just compensation, and that judicial review is foreclosed except in cases of fraud. 564 F. Supp., at 567. The District Court also found that the arbitration scheme was infirm because it did not meet the requirements of Art. III of the Constitution. *Ibid.* Finally, the court found that a remedy under the Tucker Act was not available for the deprivations of property effected by §§ 3 and 10. 564 F. Supp., at 567–568.

The District Court therefore declared §§ 3(c)(1)(D), 3(c)(2)(A), 10(b), and 10(d) of FIFRA, as amended by the Federal Pesticide Act of 1978, to be unconstitutional, and permanently enjoined EPA from implementing or enforcing those sections. See Amended Judgment, App. to Juris. Statement 41a.[7]

We noted probable jurisdiction. 464 U. S. 890 (1983).

III

In deciding this case, we are faced with four questions: (1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause in the health, safety, and environmental data it has submitted to EPA? (2) If so, does EPA's use of the data to evaluate the applications of others or EPA's disclosure of the data to qualified members of the public effect a taking of that property interest? (3) If there is a taking, is it a taking for a public use? (4) If there is a taking for a public use, does the statute adequately provide for just compensation?

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[7] The District Court's judgment in this case is in conflict with the holdings of other federal courts. See, *e. g., Petrolite Corp.* v. *United States Environmental Protection Agency,* 519 F. Supp. 966 (DC 1981); *Mobay Chemical Corp.* v. *Costle,* 517 F. Supp. 252, and 517 F. Supp. 254 (WD Pa. 1981), aff'd *sub nom. Mobay Chemical Co.* v. *Gorsuch,* 682 F. 2d 419 (CA3), cert. denied, 459 U. S. 988 (1982); *Chevron Chemical Co.* v. *Costle,* 499 F. Supp. 732 (Del. 1980), aff'd, 641 F. 2d 104 (CA3), cert. denied, 452 U. S. 961 (1981).

For purposes of this case, EPA has stipulated that "Monsanto has certain property rights in its information, research and test data that it has submitted under FIFRA to EPA and its predecessor agencies which may be protected by the Fifth Amendment to the Constitution of the United States." App. 36. Since the exact import of that stipulation is not clear, we address the question whether the data at issue here can be considered property for the purposes of the Taking Clause of the Fifth Amendment.

This Court never has squarely addressed the applicability of the protections of the Taking Clause of the Fifth Amendment to commercial data of the kind involved in this case. In answering the question now, we are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 161 (1980), quoting *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). Monsanto asserts that the health, safety, and environmental data it has submitted to EPA are property under Missouri law, which recognizes trade secrets, as defined in § 757, Comment *b*, of the Restatement of Torts, as property. See *Reddi-Wip, Inc.* v. *Lemay Valve Co.*, 354 S. W. 2d 913, 917 (Mo. App. 1962); *Harrington* v. *National Outdoor Advertising Co.*, 355 Mo. 524, 532, 196 S. W. 2d 786, 791 (1946); *Luckett* v. *Orange Julep Co.*, 271 Mo. 289, 302–304, 196 S. W. 740, 743 (1917). The Restatement defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." § 757, Comment *b*. And the parties have stipulated that much of the information, research, and test data that Monsanto has submitted under

FIFRA to EPA "contains or relates to trade secrets as defined by the Restatement of Torts." App. 36.

Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. See *Harrington*, *supra; Reddi-Wip*, *supra;* Restatement of Torts, *supra;* see also *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, 474–476 (1974). Information that is public knowledge or that is generally known in an industry cannot be a trade secret. Restatement of Torts, *supra.* If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. See *Harrington*, *supra;* 1 R. Milgrim, Trade Secrets § 1.01[2] (1983).

Trade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable. See, *e. g.*, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 401–402 (1911); *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d 216, 225 (CA2 1971). A trade secret can form the res of a trust, Restatement (Second) of Trusts § 82, Comment *e* (1959); 1 A. Scott, Law of Trusts § 82.5, p. 703 (3d ed. 1967), and it passes to a trustee in bankruptcy. See *In re Uniservices, Inc.*, 517 F. 2d 492, 496–497 (CA7 1975).

Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a "proprietary interest" in their data. S. Rep. No. 95–334, at 31. Further, Congress reasoned that submitters of data are "entitled" to "compensation" because they "have legal ownership of the data." H. R. Conf. Rep. No. 95–1560, p. 29 (1978).[8] This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labour and invention." 2 W. Blackstone, Commentaries *405; see generally J. Locke, The Second Treatise of Civil Government, ch. 5 (J. Gough ed. 1947).

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[8] Of course, it was not necessary that Congress recognize the data at issue here as property in order for the data to be protected by the Taking

Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. See, *e. g.*, *Armstrong* v. *United States*, 364 U. S. 40, 44, 46 (1960) (materialman's lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 596–602 (1935) (real estate lien protected); *Lynch* v. *United States*, 292 U. S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court:

> "It is conceivable that [the term 'property' in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377–378 (1945).

We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law,

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Clause. We mention the legislative history merely as one more illustration of the general perception of the property-like nature of trade secrets.

that property right is protected by the Taking Clause of the Fifth Amendment.[9]

IV

Having determined that Monsanto has a property interest in the data it has submitted to EPA, we confront the difficult question whether a "taking" will occur when EPA discloses those data or considers the data in evaluating another application for registration. The question of what constitutes a "taking" is one with which this Court has wrestled on many occasions. It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking, for

> "courts have held that the deprivation of the former owner rather than the accretion of a right or interest

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[9] Contrary to EPA's contention, Brief for Appellant 29, Justice Holmes' dictum in *E. I. du Pont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100 (1917), does not undermine our holding that a trade secret is property protected by the Fifth Amendment Taking Clause. *Masland* arose from a dispute about the disclosure of trade secrets during preparation for a trial. In his opinion for the Court, the Justice stated:

> "The case has been considered as presenting a conflict between a right of property and a right to make a full defence, and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defence are adjudged against him before he has a chance to be heard or to prove his case. We approach the question somewhat differently. The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs." *Id.*, at 102.

Justice Holmes did not deny the existence of a property interest; he simply deemed determination of the existence of that interest irrelevant to resolution of the case. In a case decided prior to *Masland*, the Court had spoken of trade secrets in property terms. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250–253 (1905) (Holmes, J., for the Court). See generally 1 R. Milgrim, Trade Secrets § 1.01[1] (1983).

> to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States* v. *General Motors Corp.*, 323 U. S., at 378.

See also *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

As has been admitted on numerous occasions, "this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action'" must be deemed a compensable taking. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979), quoting *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978); accord, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 295 (1981). The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. *Kaiser Aetna*, 444 U. S., at 175. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83; see *Kaiser Aetna*, 444 U. S., at 175; *Penn Central*, 438 U. S., at 124. It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data.

A

A "reasonable investment-backed expectation" must be more than a "unilateral expectation or an abstract need."

Webb's Fabulous Pharmacies, 449 U. S., at 161. We find that with respect to any health, safety, and environmental data that Monsanto submitted to EPA after the effective date of the 1978 FIFRA amendments—that is, on or after October 1, 1978[10]—Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.

Thus, with respect to any data submitted to EPA on or after October 1, 1978, Monsanto knew that, for a period of 10 years from the date of submission, EPA would not consider those data in evaluating the application of another without Monsanto's permission. § 3(c)(1)(D)(i). It was also aware, however, that once the 10-year period had expired, EPA could use the data without Monsanto's permission. §§ 3(c)(1)(D)(ii) and (iii). Monsanto was further aware that it was entitled to an offer of compensation from the subsequent applicant only until the end of the 15th year from the date of submission. § 3(c)(1)(D)(iii). In addition, Monsanto was aware that information relating to formulae of products could be revealed by EPA to "any Federal agency consulted and [could] be revealed at a public hearing or in findings of fact" issued by EPA "when necessary to carry out" EPA's duties under FIFRA. § 10(b). The statute also gave Monsanto notice that much of the health, safety, and efficacy data provided by it could be disclosed to the general public at any time. § 10(d). If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

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[10] The Federal Pesticide Act of 1978 was approved on September 30, 1978. 92 Stat. 842. The new data-consideration and data-disclosure provisions applied with full force to all data submitted after that date.

Monsanto argues that the statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit. See Brief for Appellee 29. But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for "'the advantage of living and doing business in a civilized community.'" *Andrus* v. *Allard*, 444 U. S. 51, 67 (1979), quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 422 (Brandeis, J., dissenting); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424 (1952). This is particularly true in an area, such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation. That Monsanto is willing to bear this burden in exchange for the ability to market pesticides in this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the 1978 amendments to FIFRA.[11] 564 F. Supp., at 561.

Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking. See *Corn Products Refining Co.* v. *Eddy*, 249 U. S.

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[11] Because the market for Monsanto's pesticide products is an international one, Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign markets. Presumably, it will do so in those situations where it deems the data to be protected from disclosure more valuable than the right to sell in the United States.

427, 431–432 (1919) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth"); see also *Westinghouse Electric Corp.* v. *United States Nuclear Regulatory Comm'n*, 555 F. 2d 82, 95 (CA3 1977).

B

Prior to the 1972 amendments, FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Another statute, the Trade Secrets Act, 18 U. S. C. § 1905, however, arguably is relevant. That Act is a general criminal statute that provides a penalty for any employee of the United States Government who discloses, in a manner not authorized by law, any trade-secret information that is revealed to him during the course of his official duties. This Court has determined that § 1905 is more than an "antileak" statute aimed at deterring Government employees from profiting by information they receive in their official capacities. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 298–301 (1979). Rather, § 1905 also applies to formal agency action, *i. e.*, action approved by the agency or department head. *Ibid.*

It is true that, prior to the 1972 amendments, neither FIFRA nor any other provision of law gave EPA authority to disclose data obtained from Monsanto. But the Trade Secrets Act is not a guarantee of confidentiality to submitters of data, and, absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. Thus, with respect to data submitted to EPA in connection with an application for registration prior to October 22, 1972,[12] the Trade Secrets Act provided no basis for a reasonable investment-backed expectation that data submitted to EPA would remain confidential.

A fortiori, the Trade Secrets Act cannot be construed as any sort of assurance against internal agency use of submitted data during consideration of the application of a subsequent applicant for registration.[13] Indeed, there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known.[14] Thus,

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[12] The 1972 amendments to FIFRA became effective at the close of the business day on October 21, 1972. 86 Stat. 998.

[13] The Trade Secrets Act prohibits a Government employee from "publish[ing], divulg[ing], disclos[ing] or mak[ing] known" confidential information received in his official capacity. 18 U. S. C. § 1905. In considering the data of one applicant in connection with the application of another, EPA does not violate any of these prohibitions.

[14] The District Court found: "During the period that USDA administered FIFRA, it was also its *policy* that the data developed and submitted by companies such as [Monsanto] could not be used to support the registration of another's product without the permission of the data submitter." *Monsanto Co.* v. *Acting Administrator, United States Environmental Protection Agency,* 564 F. Supp. 552, 564 (ED Mo. 1983) (emphasis in original). The District Court apparently based this finding on the testimony of two former Directors of the Pesticide Regulation Division, who testified that they knew of no instance in which data submitted by one applicant were subsequently considered in evaluating another application. *Ibid.*

This finding is in marked conflict with the statement of the National Agricultural Chemicals Association, presented before a Senate Subcommittee in 1972, which advocated that the 1972 amendments to FIFRA should contain an exclusive-use provision:

"Under the present law registration information submitted to the Administrator has not routinely been made available for public inspection. Such information has, however, as a matter of practice but without statutory authority, been considered by the Administrator to support the registration of the same or a similar product by another registrant." Federal with respect to any data that Monsanto submitted to EPA prior to the effective date of the 1972 amendments to FIFRA, we hold that Monsanto could not have had a "reasonable investment-backed expectation" that EPA would maintain those data in strictest confidence and would use them exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted.

C

The situation may be different, however, with respect to data submitted by Monsanto to EPA during the period from October 22, 1972, through September 30, 1978. Under the statutory scheme then in effect, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. When Monsanto provided data to EPA during this period, it was with the understanding, embodied in FIFRA, that EPA was free to use any of the submitted data that were not trade secrets in considering the application of another, provided

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Environmental Pesticide Control Act: Hearings before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 92d Cong., 2d Sess., pt. 2, p. 245 (1972).

In addition, EPA points to the Department of Agriculture's Interpretation with Respect to Warning, Caution and Antidote Statements Required to Appear on Labels of Economic Poisons, 27 Fed. Reg. 2267 (1962), which presents a list of pesticides that would require no additional toxicological data for registration. The clear implication from the Interpretation is that the Department determined that the data already submitted with respect to those chemicals would be sufficient for purposes of evaluating any future applications for registration of those chemicals.

Although the evidence against the District Court's finding seems overwhelming, we need not determine that the finding was clearly erroneous in order to find that a submitter had no reasonable expectation that the Department or EPA would not use the data it had submitted when evaluating the application of another. The District Court did not find that the policy of the Department was publicly known at the time or that there was any explicit guarantee of exclusive use.

that EPA required the subsequent applicant to pay "reasonable compensation" to the original submitter. § 3(c)(1)(D), 86 Stat. 979. But the statute also gave Monsanto explicit assurance that EPA was prohibited from disclosing publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. § 10, 86 Stat. 989. Thus, with respect to trade secrets submitted under the statutory regime in force between the time of the adoption of the 1972 amendments and the adoption of the 1978 amendments, the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

The right to exclude others is generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U. S., at 176. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.[15]

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[15] We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data

That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.

EPA encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a "pre-emption" of whatever property rights Monsanto may have had in those trade secrets. Brief for Appellant 27–28. The agency argues that the proper functioning of the comprehensive FIFRA registration scheme depends upon its uniform application to all data. Thus, it is said, the Supremacy Clause dictates that the scheme not vary depending on the property law of the State in which the submitter is located. *Id.*, at 28. This argument proves too much. If Congress can "pre-empt" state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, "by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S., at 164.

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to improve its own technology that may constitute a taking. If, however, a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

If a negotiation or arbitration pursuant to § 3(c)(1)(D)(ii) were to yield just compensation to Monsanto for the loss in the market value of its trade-secret data suffered because of EPA's consideration of the data in connection with another application, then Monsanto would have no claim against the Government for a taking. Since no arbitration has yet occurred with respect to any use of Monsanto's data, any finding that there has been an actual taking would be premature. See *infra*, at 1019–1020.[16]

In summary, we hold that EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978;[17] the data constituted trade secrets under Missouri law; Monsanto had designated the data as trade secrets at the time of its submission; the use or disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute during that period; and the operation of the arbitration provision does not adequately compensate for the loss in market value of the data that Monsanto suffers because of EPA's use or disclosure of the trade secrets.

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[16] Because the record contains no findings with respect to the value of the trade-secret data at issue and because no arbitration proceeding has yet been held to detemine the amount of recovery to be paid by a subsequent applicant to Monsanto, we cannot preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation, thus nullifying any claim against the Government for a taking when EPA uses Monsanto's data in considering another application. The statutory arbitration scheme, of course, provides for compensation only in cases where the data are considered in connection with a subsequent application, not in cases of disclosure of the data.

[17] While the 1975 amendments to FIFRA purported to carry backward the protections against data consideration and data disclosure to submissions of data made on or after January 1, 1970, 89 Stat. 751, the relevant consideration for our purposes is the nature of the expectations of the submitter at the time the data were submitted. We therefore do not extend our ruling as to a possible taking to data submitted prior to October 22, 1972.

V

We must next consider whether any taking of private property that may occur by operation of the data-disclosure and data-consideration provisions of FIFRA is a taking for a "public use." We have recently stated that the scope of the "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority* v. *Midkiff*, *ante*, at 240; see *Berman* v. *Parker*, 348 U. S. 26, 33 (1954). The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow. *Midkiff*, *supra; Berman*, *supra*, at 32.

The District Court found that EPA's action pursuant to the data-consideration provisions of FIFRA would effect a taking for a private use, rather than a public use, because such action benefits subsequent applicants by forcing original submitters to share their data with later applicants. 564 F. Supp., at 566. It is true that the most direct beneficiaries of EPA actions under the data-consideration provisions of FIFRA will be the later applicants who will support their applications by citation to data submitted by Monsanto or some other original submitter. Because of the data-consideration provisions, later applicants will not have to replicate the sometimes intensive and complex research necessary to produce the requisite data. This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public. *Midkiff*, *ante*, at 243–244; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 707 (1923); *Block* v. *Hirsh*, 256 U. S. 135, 155 (1921).

So long as the taking has a conceivable public character, "the means by which it will be attained is . . . for Congress to determine." *Berman*, 348 U. S., at 33. Here, the public purpose behind the data-consideration provisions is clear from the legislative history. Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products. S. Rep. No. 95–334, at 30–31, 40–41; 124 Cong. Rec. 29756–29757 (1978) (remarks of Sen. Leahy). Such a procompetitive purpose is well within the police power of Congress. See *Midkiff*, *ante*, at 241–242.[18]

Because the data-disclosure provisions of FIFRA provide for disclosure to the general public, the District Court did not find that those provisions constituted a taking for a private use. Instead, the court found that the data-disclosure provisions served no use. It reasoned that because EPA, before registration, must determine that a product is safe and effective, and because the label on a pesticide, by statute, must set forth the nature, contents, and purpose of the pesticide, the label provided the public with all the assurance it needed that the product is safe and effective. 564 F. Supp., at 567, and n. 4. It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question. See 123 Cong. Rec., at 25706 (remarks of Sen. Leahy). We further observe, however, that public disclosure can provide an effective check on the decisionmaking processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product. See H. R. Rep. No. 95–343, p. 8 (1977) (remarks of Douglas M. Costle); S. Rep. No. 95–334, at 13.

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[18] Monsanto argues that EPA and, by implication, Congress misapprehended the true "barriers to entry" in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry. Brief for Appellee 35, n. 48. Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective. *Midkiff*, *ante*, at 242–243; *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U. S. 648, 671–672 (1981).

We therefore hold that any taking of private property that may occur in connection with EPA's use or disclosure of data submitted to it by Monsanto between October 22, 1972, and September 30, 1978, is a taking for a public use.

VI

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law,[19] when a suit for compensation can be brought against the sovereign subsequent to the taking. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 697, n. 18 (1949). The Fifth Amendment does not require that compensation precede the taking. *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932). Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U. S. C. § 1491.[20] *United States* v. *Causby*, 328 U. S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine"); *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21 (1940).

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[19] Any taking of private property that would occur as a result of EPA disclosure or consideration of data submitted by Monsanto between October 22, 1972, and September 30, 1978, is, of course, duly authorized by FIFRA as amended in 1978.

[20] The Tucker Act, 28 U. S. C. § 1491, reads, in relevant part:

"The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

In this case, however, the District Court enjoined EPA action under the data-consideration and data-disclosure provisions of FIFRA, finding that a Tucker Act remedy is not available for any taking of property that may occur as a result of the operation of those provisions. We do not agree with the District Court's assessment that no Tucker Act remedy will lie for whatever taking may occur due to EPA activity pursuant to FIFRA.

In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 126 (1974) (emphasis in original).

Nowhere in FIFRA or in its legislative history is there discussion of the interaction between FIFRA and the Tucker Act. Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker Act. This Court has recognized, however, that "repeals by implication are disfavored." *Regional Rail Reorganization Act Cases*, 419 U. S., at 133. See, *e. g.*, *Amell* v. *United States*, 384 U. S. 158, 165–166 (1966); *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 565 (1963); *United States* v. *Borden Co.*, 308 U. S. 188, 198–199 (1939).

Monsanto argues that FIFRA's provision that an original submitter of data who fails to participate in a procedure for reaching an agreement or in an arbitration proceeding, or fails to comply with the terms of an agreement or arbitration decision, "shall forfeit the right to compensation for the use of the data in support of the application," § 3(c)(1)(D)(ii), indicates Congress' intent that there be no Tucker Act remedy. But where two statutes are "'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Regional Rail Reorganization Act Cases*, 419 U. S., at 133–134, quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). Here, contrary to Monsanto's claim, it is entirely possible for the Tucker Act and FIFRA to co-exist. The better interpretation, therefore, of the FIFRA language on forfeiture, which gives force to both the Tucker Act and the FIFRA provision, is to read FIFRA as implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure. Cf. *Regional Rail Reorganization Act Cases*, 419 U. S., at 154–156 (viewing Tucker Act remedy as covering any shortfall between statutory remedy and just compensation).[21]

With respect to data disclosure to the general public, FIFRA provides for no compensation whatsoever. Thus, Monsanto's argument that Congress intended the compensation scheme provided in FIFRA to be exclusive has no relevance to the data-disclosure provisions of § 10.

Congress in FIFRA did not address the liability of the Government to pay just compensation should a taking occur. Congress' failure specifically to mention or provide for recourse against the Government may reflect a congressional belief that use of data by EPA in the ways authorized by FIFRA effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. In any event, the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy. "[W]hether or not the United States so intended," any taking claim under FIFRA is one "founded . . . upon the Constitution," and is thus remediable under the Tucker Act. *Regional Rail Reorganization Act Cases*, 419 U. S., at 126. Therefore, where the operation of the data-consideration and data-disclosure provisions of FIFRA effect a taking of property belonging to Monsanto, an adequate remedy for the taking exists under the Tucker Act. The District Court erred in enjoining the taking.

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[21] Exhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation of the statute provides compensation, no taking has occurred and the original submitter of data has no claim against the Government.

VII

Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution. Because of the availability of the Tucker Act, Monsanto's ability to obtain just compensation does not depend solely on the validity of the statutory compensation scheme. The operation of the arbitration procedure affects only Monsanto's ability to vindicate its statutory right to obtain compensation from a subsequent applicant whose registration application relies on data originally submitted by Monsanto, not its ability to vindicate its constitutional right to just compensation.

Monsanto did not allege or establish that it had been injured by actual arbitration under the statute. While the District Court acknowledged that Monsanto had received several offers of compensation from applicants for registration, 564 F. Supp., at 561, it did not find that EPA had considered Monsanto's data in considering another application. Further, Monsanto and any subsequent applicant may negotiate and reach agreement concerning an outstanding offer. If they do not reach agreement, then the controversy must go to arbitration. Only after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U. S., at 138.

VIII

We find no constitutional infirmity in the challenged provisions of FIFRA. Operation of the provisions may effect a taking with respect to certain health, safety, and environmental data constituting trade secrets under state law and designated by Monsanto as trade secrets upon submission to EPA between October 22, 1972, and September 30, 1978.[22] But whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation. Once a taking has occurred, the proper forum for Monsanto's claim is the Claims Court. Monsanto's challenges to the constitutionality of the arbitration procedure are not yet ripe for review. The judgment of the District Court is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE took no part in the consideration or decision of this case.

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[22] We emphasize that nothing in our opinion prohibits EPA's consideration or disclosure, in a manner authorized by FIFRA, of data submitted to it by Monsanto. Our decision merely holds that, with respect to a certain limited class of data submitted by Monsanto to EPA, EPA actions under the data-disclosure and data-consideration provisions of the statute may give Monsanto a claim for just compensation.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I join all of the Court's opinion except for Part IV–B and the Court's conclusion, *ante*, at 1013, that "EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972 . . . does not effect a taking." In my view public disclosure of pre-1972 data would effect a taking. As to consideration of this information within EPA in connection with other license applications not submitted by Monsanto, I believe we should remand to the District Court for further factual findings concerning Monsanto's expectations regarding interagency uses of trade secret information prior to 1972.

It is important to distinguish at the outset public disclosure of trade secrets from use of those secrets entirely within EPA. Internal use may undermine Monsanto's competitive position within the United States, but it leaves Monsanto's position in foreign markets undisturbed. As the Court notes, *ante*, at 1007, n. 11, the likely impact on foreign market position is one that Monsanto would weigh when deciding whether to submit trade secrets to EPA. Thus a submission of trade secrets to EPA that implicitly consented to further use of the information within the agency is not necessarily the same as one that implicitly consented to public disclosure.

It seems quite clear—indeed the Court scarcely disputes—that public disclosure of trade secrets submitted to the Federal Government before 1972 was neither permitted by law, nor customary agency practice before 1972, nor expected by applicants for pesticide registrations. The Court correctly notes that the Trade Secrets Act, 18 U. S. C. § 1905, flatly proscribed such disclosures. The District Court expressly found that until 1970 it was Government "policy that the data developed and submitted by companies such as [Monsanto] be maintained confidentially by the [administrative agency] and was not to be disclosed without the permission of the data submitter." *Monsanto Co.* v. *Acting Administrator, EPA*, 564 F. Supp. 552, 564 (1983). Finally, the Court, *ante*, at

1009, n. 14, quotes from a 1972 statement by the National Agricultural Chemicals Association that "registration information submitted to the Administrator has not routinely been made available for public inspection." It is hard to imagine how a pre-1972 applicant for a pesticide license would not, under these circumstances, have formed a very firm expectation that its trade secrets submitted in connection with a pesticide registration would not be disclosed to the public.

The Court's analysis of this question appears in a single sentence: an "industry that long has been the focus of great public concern and significant government regulation" can have no reasonable expectation that the Government will not later find public disclosure of trade secrets to be in the public interest. *Ante*, at 1008. I am frankly puzzled to read this statement in the broader context of the Court's otherwise convincing opinion. If the degree of Government regulation determines the reasonableness of an expectation of confidentiality, Monsanto had as little reason to expect confidentiality *after* 1972 as before, since the 1972 amendments were not deregulatory in intent or effect. And the Court entirely fails to explain why the nondisclosure provision of the 1972 Act, § 10, 86 Stat. 989, created any greater expectation of confidentiality than the Trade Secrets Act. Section 10 prohibited EPA from disclosing "trade secrets or commercial or financial information." No penalty for disclosure was prescribed, unless disclosure was with the intent to defraud. The Trade Secrets Act, 18 U. S. C. § 1905, prohibited and still prohibits Government disclosure of trade secrets and other commercial or financial information revealed during the course of official duties, on pain of substantial criminal sanctions. The Court acknowledges that this prohibition has always extended to formal and official agency action. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 298–301 (1979). It seems to me that the criminal sanctions in the Trade Secrets Act therefore created at least as strong an expectation of privacy before 1972 as the precatory language of § 10 created after 1972.

The Court's tacit analysis seems to be this: an expectation of confidentiality can be grounded only on a statutory nondisclosure provision situated in close physical proximity, in the pages of the United States Code, to the provisions pursuant to which information is submitted to the Government. For my part, I see no reason why Congress should not be able to give effective protection to all trade secrets submitted to the Federal Government by means of a single, overarching, trade secrets provision. We routinely assume that wrongdoers are put on notice of the entire contents of the Code, though in all likelihood most of them have never owned a copy or opened a single page of it. It seems strange to assume, on the other hand, that a company like Monsanto, well served by lawyers who undoubtedly do read the Code, could build an expectation of privacy in pesticide trade secrets only if the assurance of confidentiality appeared in Title 7 itself.

The question of interagency use of trade secrets before 1972 is more difficult because the Trade Secrets Act most likely does not extend to such uses. The District Court found that prior to October 1972 only two competitors' registrations were granted on the basis of data submitted by Monsanto, and that Monsanto had no knowledge of either of these registrations prior to their being granted. 564 F. Supp., at 564. The District Court also found that before 1970 it was agency policy "that the data developed and submitted by companies such as [Monsanto] could not be used to support the registration of another's product without the permission of the data submitter." *Ibid.* This Court, however, concludes on the basis of two cited fragments of evidence that "the evidence against the District Court's finding seems overwhelming." *Ante*, at 1010, n. 14. The Court nevertheless wisely declines to label the District Court's findings of fact on this matter clearly erroneous. Instead, the Court notes that the "District Court did not find that the policy of the Department [of Agriculture] was publicly known at the time [before 1970] or that there was any explicit guarantee of exclusive use." *Ibid.* This begs exactly the right question, but the

Court firmly declines to answer it. The Court simply states that "there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known." *Ante*, at 1009 (footnote omitted). And then, without more ado, the Court declares that with respect to pre-1972 data Monsanto "could not have had a 'reasonable investment-backed expectation' that EPA would . . . use [the data] exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted." *Ante*, at 1010.

If one thing is quite clear it is that the extent of Monsanto's pre-1972 expectations, whether reasonable and investment-backed or otherwise, is a heavily factual question. It is fairly clear that the District Court found that those expectations existed as a matter of fact and were reasonable as a matter of law. But if the factual findings of the District Court on this precise question were not as explicit as they might have been, the appropriate disposition is to remand to the District Court for further factfinding. That is the course I would follow with respect to interagency use of trade secrets submitted by Monsanto before 1972.

PATTON ET AL. *v.* YOUNT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-95. Argued February 28, 1984—Decided June 26, 1984

After a jury trial in a Pennsylvania state court in 1966, respondent was convicted of first-degree murder and rape, and was sentenced to life imprisonment. However, on direct appeal the Pennsylvania Supreme Court held that the police had violated respondent's constitutional rights in securing confessions that had been admitted in evidence, and remanded the case for a new trial. Before and during an extensive *voir dire* examination of potential jurors at the second trial in 1970, respondent moved for a change of venue, arguing that publicity concerning the case had resulted in dissemination of prejudicial information that could not be eradicated from the potential jurors' minds. The trial court denied the motions, and respondent was convicted again of first-degree murder. He was resentenced to life imprisonment, and the trial court denied a motion for a new trial, finding that practically no publicity had been given to the case between the two trials, that little public interest was shown during the second trial, and that the jury was without bias. The Pennsylvania Supreme Court affirmed the conviction and the trial court's findings. Respondent then sought habeas corpus relief in Federal District Court, claiming that his conviction had been obtained in violation of his right under the Sixth and Fourteenth Amendments to a fair trial by an impartial jury. Upholding the state trial court's view that the jury was impartial, the District Court denied relief, but the Court of Appeals reversed. Relying primarily on *Irvin* v. *Dowd*, 366 U. S. 717, the court found that pretrial publicity had made a fair trial impossible in the county.

Held:

1. The *voir dire* testimony and the record of publicity do not reveal the kind of "wave of public passion" that would have made a fair trial unlikely by the empaneled jury as a whole. Although *Irvin* v. *Dowd*, *supra*, held that adverse publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed, it also recognized that the trial court's findings of impartiality may be overturned only for "manifest error." In this case, the extensive adverse publicity and the community's sense of outrage were at their height prior to respondent's first trial. The record shows that prejudicial publicity was greatly diminished and community senti-

ment had softened when the jury for the second trial was selected four years later. Thus the trial court did not commit manifest error in finding that the jury as a whole was impartial. Potential jurors who had retained fixed opinions as to respondent's guilt were disqualified, and the fact that the great majority of veniremen "remembered the case," without more, is essentially irrelevant. The relevant question is whether the jurors at respondent's second trial had such fixed opinions that they could not judge impartially respondent's guilt. The passage of time between the first and second trials clearly rebutted any presumption of partiality or prejudice that existed at the time of the initial trial. Pp. 1031–1035.

2. There is no merit in respondent's argument that one of the selected jurors, as well as the two alternates, had been erroneously seated over his challenges for cause. The ambiguity in the testimony of the cited jurors was insufficient to overcome the presumption of correctness, under 28 U. S. C. § 2254(d), owed to the trial court's findings. The question of an individual juror's partiality is plainly one of historical fact, and there is fair support in the record for the state courts' conclusion that the jurors here would be impartial. Pp. 1036–1040.

710 F. 2d 956, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 1040. MARSHALL, J., took no part in the decision of the case.

F. Cortez Bell III argued the cause for petitioners. With him on the brief was *Thomas F. Morgan*.

George E. Schumacher, by appointment of the Court, 464 U. S. 980, argued the cause for respondent. With him on the brief were *Thomas S. White* and *James V. Wade*.

JUSTICE POWELL delivered the opinion of the Court.

This case brings before us a claim that pretrial publicity so infected a state criminal trial as to deny the defendant his Sixth Amendment right to an "impartial jury."

I

On April 28, 1966, the body of Pamela Rimer, an 18-year-old high school student, was found in a wooded area near her home in Luthersburg, Clearfield County, Pa. There were numerous wounds about her head and cuts on her throat and neck. An autopsy revealed that she died of strangulation when blood from her wounds was drawn into her lungs. The autopsy showed no indication that she had been sexually assaulted.

At about 5:45 the following morning, respondent Yount appeared at the State Police Substation in nearby DuBois. Yount, who had been the victim's high school mathematics teacher, proceeded to give the police oral and written confessions to the murder. The police refused to release the confession to the press, and it was not published until after it was read at Yount's arraignment three days later. Record, Ex. P–1–a, P–1–d. At his trial in 1966, the confessions were admitted into evidence. Yount took the stand and claimed temporary insanity. The jury convicted him of first-degree murder and rape, and he was sentenced to life imprisonment. On direct appeal the Pennsylvania Supreme Court determined that under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), police had given Yount inadequate notice of his right to an attorney prior to his confession. The court remanded for a new trial. *Commonwealth* v. *Yount*, 435 Pa. 276, 256 A. 2d 464 (1969), cert. denied, 397 U. S. 925 (1970).

Prior to the second trial in 1970, the trial court ordered suppression of Yount's written confessions and that portion of the oral confession that was obtained after he was legally in custody. The prosecution dismissed the rape charge. There followed an extensive *voir dire* that is now at the heart of this case. Jury selection began on November 4, 1970, and took 10 days, 7 jury panels, 292 veniremen, and 1,186 pages of testimony. Yount moved for a change of venue before, and several times during, the *voir dire*. He argued that the widespread dissemination of prejudicial information could not be eradicated from the minds of potential jurors, and cited in support the difficulty of the *voir dire* and numerous newspaper and other articles about the case. The motions were denied. The trial court noted that the articles merely reported events without editorial comment; that the length of the *voir dire* resulted in part from the court's leniency in allowing examinations and challenges of the jurors; that "almost all, if not all," the jurors seated had "no prior or present fixed opinion"; and that there had been "little, if any, talk in public" between the two trials. The court also observed that the *voir dire* of the second trial had been sparsely attended.

Ultimately, 12 jurors and 2 alternates were seated. At the second trial, Yount did not take the stand and did not claim temporary insanity. Instead he relied upon cross-examination and character witnesses in an attempt to undermine the State's proof of his intent. The jury convicted him again of first-degree murder, and he was resentenced to life imprisonment. The trial court denied a motion for a new trial, finding that practically no publicity had been given to the case between the two trials, and that little public interest was shown during the second trial. App. 268a. In addition, the court concluded that the jury was without bias. The Pennsylvania Supreme Court affirmed the conviction and the trial court's findings. *Commonwealth* v. *Yount*, 455 Pa. 303, 311–314, 314 A. 2d 242, 247–248 (1974).

In January 1981, Yount filed a petition for a writ of habeas corpus in United States District Court. He claimed, *inter alia,* that his conviction had been obtained in violation of his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. The case was assigned to a Magistrate, who conducted a hearing and recommended that the petition be granted. The District Court rejected the Magistrate's recommendation. 537 F. Supp. 873 (WD Pa. 1982). It held that the pretrial publicity was not vicious, excessive, nor officially sponsored, and that the jurors were able to set aside any preconceived notions of guilt. It noted that the percentage of jurors excused for cause was "not remarkable to anyone familiar with the difficulty in selecting a homicide jury in Pennsylvania." *Id.*, at 882. In addition, the court reviewed the instances in which the state trial court had denied a challenge for cause, and upheld the trial court's view that the jury was impartial.

The Court of Appeals for the Third Circuit reversed. 710 F. 2d 956 (1983). The court relied primarily on the analysis set out in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), and found that pretrial publicity had made a fair trial impossible in Clearfield County. It independently examined the nature of the publicity surrounding the second trial, the testimony at *voir dire* of the venire as a whole, and the *voir dire* testimony of the jurors eventually seated. The publicity revealed Yount's prior conviction for murder, his confession, and his prior plea of temporary insanity, information not admitted into evidence at trial.[1] The *voir dire* showed that all but 2 of 163 veniremen questioned about the case[2] had heard of it, and that, 126, or 77%, admitted they would carry an opinion into the jury box. This was a higher percentage than in *Irvin*, where 62% of the 430 veniremen were dismissed for cause because they had fixed opinions concerning the petitioner's guilt. Finally, the Court of Appeals found that 8 of the 14 jurors and alternates actually seated admitted that at some time they had formed an opinion as to Yount's guilt.[3] The court thought that many of the jurors had given equivocal responses when asked whether they could set aside these opinions, and that one juror, a Mr. Hrin, and both alternates would have required evidence to overcome their beliefs. The court concluded that "despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented." 710 F. 2d, at 972.[4]

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[1] The Court of Appeals rejected as without fair support in the record the trial court's conclusion that there was practically no publicity given to the case between the first and second trials. See 710 F. 2d 956, 969, n. 21 (1983). The federal court suggested that the record on habeas of the publicity after the first trial and during the second was more complete than the record considered by the trial court. *Ibid.*

The Court of Appeals also suggested that the trial court's view that there was little talk in public concerning the second trial was undermined by the *voir dire* testimony that there had been public discussion of the case, particularly in the last weeks before retrial. *Id.*, at 969, n. 22. The court discounted, as of limited significance, the trial court's point that few spectators had attended the trial, since Yount did not allege prejudice arising from the "'circus atmosphere'" in the courtroom. *Ibid.*

[2] One hundred twenty-five of the original 292 veniremen were excused because they had not been chosen properly. Four others were dismissed for cause before they were questioned on the case.

Judge Garth concurred in the judgment. He declined to join the court's view that actual prejudice on the part of the jury might be inferred from pretrial publicity and the answers at *voir dire* of veniremen not selected for the jury. He wrote that "[a] thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to the defendant." *Id.*, at 979.[5] Judge Garth nevertheless concurred because in his view juror Hrin stated at *voir dire* that he would have required evidence to change his mind about Yount's guilt. This stripped the defendant of the presumption of innocence.[6]

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[3] The Court of Appeals noted that in *Irvin* 8 of 12 jurors had formed opinions of guilt.

[4] Judge Stern wrote a separate concurring opinion in which he suggested that the "constitutional standard which for 175 years has guided the lower courts" in this area be rejected. 710 F. 2d, at 972. Rather than hinge disqualification of a juror on whether he has a fixed opinion of guilt that he cannot lay aside, Judge Stern would bar any juror who admitted any opinion as to guilt. Moreover, no jury could be empaneled where more than 25% of the veniremen state that they held an opinion concerning the defendant's guilt. This would raise such doubts as to the sincerity of those who claimed no opinion as to suggest concealed bias, Judge Stern wrote.

[5] Judge Garth thought *Irvin* was distinguishable, because there "the trial court (which itself questioned the jurors challenged for cause) did not engage in a searching and thorough *voir dire*." 710 F. 2d, at 979. Rather, it merely credited the jurors' subjective opinions that each could render an impartial verdict notwithstanding his or her opinion. Judge Garth also noted that Yount challenged for cause only three of the actual jurors. In *Irvin*, the defendant challenged each of his 12 jurors for cause. *Irvin* v. *Dowd*, 359 U. S. 394, 398 (1959).

We granted certiorari, 464 U. S. 913 (1983), to consider, in the context of this case, the problem of pervasive media publicity that now arises so frequently in the trial of sensational criminal cases. We reverse the judgment of the Court of Appeals.

II

As noted, the Court of Appeals rested its decision that the jury was not impartial on this Court's decision in *Irvin* v. *Dowd*, *supra*. That decision, a leading one at the time, held that adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed. The Court in *Irvin* reviewed a number of factors in determining whether the totality of the circumstances raised such a presumption. The Court noted, however, that the trial court's findings of impartiality might be overturned only for "manifest error." 366 U. S., at 723. The Court of Appeals in this case did not address this aspect of the *Irvin* decision.[7] Moreover, the court below, in concentrating on the factors discussed at length in *Irvin*, failed to give adequate weight to other significant circumstances in this case. In *Irvin*, the Court observed that it was during the six or seven months immediately preceding trial that "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant]." *Id.*, at 725. In this case, the extensive adverse publicity and the community's sense of outrage were at their height prior to Yount's first trial in 1966. The jury selection for Yount's second trial, at issue here, did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened. In these circumstances, we hold that the trial court did not commit manifest error in finding that the jury as a whole was impartial.

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[6] Judge Garth stated that whether juror Hrin was unconstitutionally biased was a mixed question of law and fact under *Irvin*. 710 F. 2d, at 981. He therefore did not apply the presumption of correctness that is applicable to the factual findings of a state court in a federal habeas corpus proceeding, 28 U. S. C. § 2254(d).

[7] The Court of Appeals appears to have thought that two statements in *Irvin*—that a federal court must "independently evaluate" the *voir dire* testimony, and that the question of juror partiality is a mixed question of law and fact, 366 U. S., at 723—meant that there is no presumption of correctness owed to the trial court's finding that a jury as a whole is impartial. We note that *Irvin* was decided five years before Congress added to the habeas corpus statute an explicit presumption of correctness for state-court factual findings, see Pub. L. 89–711, 80 Stat. 1105–1106, and two years before this Court's opinion in *Townsend* v. *Sain*, 372 U. S. 293 (1963), provided the guidelines that were later codified. It may be that there is little practical difference between the *Irvin* "manifest error" standard and the "fairly supported by the record" standard of the amended habeas statute. See 28 U. S. C. § 2254(d). In any case, we do not think the

The record reveals that in the year and a half from the reversal of the first conviction to the start of the second *voir dire* each of the two Clearfield County daily newspapers published an average of less than one article per month. App. 642a–657a; Record, Ex. P–1–v to P–1–kk, P–2. More important, many of these were extremely brief announcements of the trial dates and scheduling such as are common in rural newspapers. *E. g.*, App. 653a–656a; Record, Ex. P–1–ff, P–1–ii, P–1–jj. The transcript of the *voir dire* contains numerous references to the sparse publicity and minimal public interest prior to the second trial. *E. g.*, App. 43a, 98a, 100a; Tr. (Nov. 4, 1970) 27–28, 90, 191, 384, 771, 829, 1142. It is true that during the *voir dire* the newspapers published articles on an almost daily basis, but these too were purely factual articles generally discussing not the crime or prior prosecution, but the prolonged process of jury selection. App. 658a–671a. In short, the record of publicity in the

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habeas standard is any less stringent. Since we uphold the state court's findings in this case under *Irvin*'s "manifest error" standard, we do not need to determine whether the subsequent development of the law of habeas corpus might have required a different analysis or result in that case.

months preceding, and at the time of, the second trial does not reveal the "barrage of inflammatory publicity immediately prior to trial," *Murphy* v. *Florida*, 421 U. S. 794, 798 (1975), amounting to a "huge . . . wave of public passion," *Irvin*, 366 U. S., at 728, that the Court found in *Irvin*.

The *voir dire* testimony revealed that this lapse in time had a profound effect on the community and, more important, on the jury, in softening or effacing opinion. Many veniremen, of course, simply had let the details of the case slip from their minds. *E. g.*, App. 194a; Tr. 33, 284, 541–544, 991. In addition, while it is true that a number of jurors and veniremen testified that at one time they had held opinions, for many, time had weakened or eliminated any conviction they had had. See, *e. g.*, App. 98a–100a (juror number 7), 128a (juror number 8); Tr. 384–385, 398–399, 831, 897 (semble), 1075–1076, 1144; see also App. 164a–166a (juror number 10).[8]

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[8] The testimony of juror number 7, Martin Karetski, during examination by defense counsel is illustrative:

"Q. You have heard the matter discussed over the years?

"A. In the past few years I haven't heard too much about it.

"Q. In 1966 when the matter came up before you knew about it then?

"A. Yes sir.

"Q. And just recently when this matter was coming up again, I presume?

"A. What I have read in the paper again.

"Q. And you have heard other people discuss it?

"A. Not too many so far.

"Q. You have heard other people express opinions about it?

"A. Not too many of those so far too.

"Q. Back around '66, did you?

"A. Yes in '66.

. . . . .

"Q. . . . I assume you had an opinion as to [Mr. Yount's] guilt or innocence [in 1966]?

"A. I had an opinion yes.

"Q. Do you have a opinion today as to his guilt or innocence?

"A. It's been a long time ago and I'm not sure now. It was in the paper he plead *[sic]* not guilty.

. . . . .

The same is true of the testimony of the jurors and veniremen who were seated late in the process and therefore were subjected to some of the articles and broadcasts disseminated daily during the *voir dire:*[9] the record suggests that their passions had not been inflamed nor their thoughts biased by the publicity. *E. g.*, *id.*, at 176a–177a, 150a–151a; Tr. 771, 959, 1027.

That time soothes and erases is a perfectly natural phenomenon, familiar to all. See *Irvin* v. *Dowd*, 271 F. 2d 552, 561 (CA7 1959) (Duffy, J., dissenting) (A continuance should have been granted because "[t]he passage of time is a great healer," and public prejudice might have "subsid[ed]"), rev'd, 366 U. S. 717 (1961); see also *Murphy*, *supra*, at 802; *Beck* v. *Washington*, 369 U. S. 541, 556 (1962). Not all members of the venire had put aside earlier prejudice, as the *voir dire* disclosed. They retained their fixed opinions, and were disqualified. But the testimony suggests that the *voir dire* resulted in selecting those who had forgotten or would need to be persuaded again.[10]

"Q. Let me ask you this then. In case you do have an opinion, could you wipe it out of your mind—erase it out of your mind before you would take a seat in the jury box and hear whatever evidence you might hear?

"A. As it is right now I have no opinion now—four or five years ago I probably did but right now I don't.

. . . . .

"Q. What happened Mr. Karetski, between then and now to eliminate that opinion if you can tell me?

"A. Well, as far as I'm concerned there wasn't much in the paper about it and it sort of slipped away from thought." App. 98a–100a.

[9] Jurors were sequestered as they were chosen.

[10] As noted, the *voir dire* in this case was particularly extensive. It took 10 days to pick 14 jurors from 292 veniremen. In *Irvin* it took 8 days to pick 14 jurors from 430 veniremen.

Contrary to Judge Garth's surmise, 710 F. 2d, at 979, however, the *voir dire* interviews quoted in the petitioner's brief in *Irvin* do not appear to be significantly less probing than those here. See Brief for Petitioner in *Irvin* v. *Dowd*, O. T. 1960, No. 41, pp. 18–59. It should also be noted that the *voir dire* in *Irvin*, like that here, was conducted largely by counsel for

The Court of Appeals below thought that the fact that the great majority of veniremen "remembered the case" showed that time had not served "to erase highly unfavorable publicity from the memory of [the] community." 710 F. 2d, at 969. This conclusion, without more, is essentially irrelevant. The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant. *Irvin*, 366 U. S., at 723. It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed. It would be fruitless to attempt to identify any particular lapse of time that in itself would distinguish the situation that existed in *Irvin*.[11] But it is clear that the passage of time between a first and a second trial can be a highly relevant fact. In the circumstances of this case, we hold that it clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial. There was fair, even abundant, support for the trial court's findings that between the two trials of this case there had been "practically no publicity given to this matter through the news media," and that there had not been "any great effect created by any publicity." App. 268a, 265a.

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each side, rather than the judge. The only significant difference in the procedures followed here and in *Irvin* is that the veniremen here were brought into the courtroom alone for questioning, while it appears that those in *Irvin* were questioned in front of all those remaining in the panel. This is not an insubstantial distinction, as the Court suggested in *Irvin*, 366 U. S., at 728, but we do not find it controlling.

[11] In *Murphy* v. *Florida*, 421 U. S. 794 (1975), the defendant—widely known as "Murph the Surf"—relied heavily on *Irvin*. The record of damaging publicity preceding his trial was at least as extreme as that in this case. Nevertheless, we found the record there distinguishable from *Irvin*. We noted that the extensive publication of news articles about Murphy largely had ceased some seven months before the jury was selected. 421 U. S., at 802. *Murphy* involved a lapse in publicity prior to the defendant's first trial; there was no second trial in that case.

III

Yount briefly argues here that juror Hrin, as well as the two alternates, were erroneously seated over his challenges for cause. Brief for Respondent 32. There is substantial doubt whether Yount properly raised in his petition for habeas corpus the claim that the trial court erroneously denied his challenge for cause to juror Hrin. Compare 710 F. 2d, at 966, n. 18, with *id.*, at 977, and n. 4 (Garth, J., concurring). And there is no evidence that the alternate jurors, who did not sit in judgment, actually talked with the other jurors during the 4-day trial. But Judge Garth in the court below based his concurrence on the view that Hrin would have required Yount to produce evidence to overcome his inclination to think the accused was guilty, and the majority of the panel thought that the 4-day association between the alternates and the other jurors "operate[d] to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand," *id.*, at 971, n. 25. Therefore, we will consider briefly the claims as to all three jurors.

It was the view of all three Court of Appeals judges that the question whether jurors have opinions that disqualify them is a mixed question of law and fact. See *id.*, at 968, n. 20, 981. Thus, they concluded that the presumption of correctness due a state court's factual findings under 28 U. S. C. § 2254(d) does not apply. The opinions below relied for this proposition on *Irvin* v. *Dowd*, 366 U. S., at 723. *Irvin* addressed the partiality of the trial jury as a whole, a question we discuss in Part II, *supra*. We do not think its analysis can be extended to a federal habeas corpus case in which the partiality of an individual juror is placed in issue. That question is not one of mixed law and fact. Rather it is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed. Cf. *Rushen* v. *Spain*, 464 U. S. 114, 120 (1983) (state-court determination that juror's deliberations were not biased by *ex parte* communications is a finding of fact).[12]

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[12] There are, of course, factual and legal questions to be considered in deciding whether a juror is qualified. The constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law, see *Irvin*, 366 U. S., at 723; whether a juror can in fact do that is a determination to which habeas courts owe special deference, see *Rushen*, 464 U. S., at 120. Cf. *Marshall* v. *Lonberger*, 459 U. S. 422, 431–432 (1983) (similar analysis as to whether a guilty plea was voluntary). See also *Reynolds* v. *United States*, 98 U. S. 145, 156 (1879) (whether a juror should be disqualified is a question involving both a legal standard and findings of fact; the latter may be set aside only for manifest error).

The dissent misreads the Court's opinion in *Reynolds* v. *United States*. *Post*, at 1050–1052, and nn. 6 and 7. *Reynolds* was decided some 87 years before the presumption of correctness for factual findings was added to 28 U. S. C. § 2254. The Court clearly did not attach the same significance to the phrase "a question of mixed law and fact" that we do today under modern habeas law. It recognized that juror-disqualification questions may raise both a question of law—whether the correct standard was applied—and a question of fact. Whether an opinion expressed by a juror was such as to meet the legal standard for disqualification was viewed as a question of fact as to which deference was due to the trial court's determination. This is apparent from the language quoted by the dissent, which notes that while the question is one of "mixed law and fact," it is "to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest." 98 U. S., at 156. Plainly, factual findings were to be considered separately from the legal standard applied, and deference was due to those findings. This is also apparent from the following passage:

> "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such *a question of fact*, except in a clear case." *Id.*, at 156–157 (emphasis added).

Taken together, these passages plainly show that the "character of [a juror's] opinion" was considered a question of fact. Contrary to the suggestion of the dissent, *post*, at 1050, n. 6, the factual question was not limited

There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended *voir dire* proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning, *e. g.*, *United States* v. *Burr*, 25 F. Cas. 49, 51 (No. 14,692g) (CC Va. 1807) (Marshall, C. J.), usually identifies bias.[13] Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." *E. g.*, *Bose Corp.* v. *Consumers Union of U. S., Inc.*, 466 U. S. 485, 500 (1984). The respect paid such findings in a habeas proceeding certainly should be no less. See *Marshall* v. *Lonberger*, 459 U. S. 422, 434–435 (1983).[14]

Thus the question is whether there is fair support in the record for the state courts' conclusion that the jurors here would be impartial. See 28 U. S. C. § 2254(d)(8). The testi-

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to whether the juror was telling the truth, but included discovering the "real character" of any opinion held. Deference was due to the trial court's conclusions on that question.

[13] Accord, *In re Application of National Broadcasting Co.*, 209 U. S. App. D. C. 354, 362, 653 F. 2d 609, 617 (1981) ("[V]oir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner"); *United States* v. *Duncan*, 598 F. 2d 839, 865 (CA4), cert. denied, 444 U. S. 871 (1979); *Calley* v. *Callaway*, 519 F. 2d 184, 209, n. 45 (CA5 1975) (en banc) (citing cases), cert. denied *sub nom. Calley* v. *Hoffman*, 425 U. S. 911 (1976). But cf. *Smith* v. *Phillips*, 455 U. S. 209, 222, and n. (1982) (O'CONNOR, J., concurring) (describing situations in which state procedures are inadequate to uncover bias); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963) (same).

[14] Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated *voir dire* calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.

mony of each of the three challenged jurors is ambiguous and at times contradictory. This is not unusual on *voir dire* examination, particularly in a highly publicized criminal case. It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

The *voir dire* examination of juror Hrin was carefully scrutinized by the state courts and the Federal District Court, as he was challenged for cause and was a member of the jury that convicted the defendant. We think that the trial judge's decision to seat Hrin, despite early ambiguity in his testimony, was confirmed after he initially denied the challenge. Defense counsel sought and obtained permission to resume cross-examination. In response to a question whether Hrin could set his opinion aside before entering the jury box or would need evidence to change his mind, the juror clearly and forthrightly stated: "I think I could enter it [the jury box] with a very open mind. I think I could . . . very easily. To say this is a requirement for some of the things you have to do every day." App. 89a. After this categorical answer, defense counsel did not renew their challenge for cause. Similarly, in the case of alternate juror Pyott, we cannot fault the trial judge for crediting her earliest testimony, in which she said that she could put her opinion aside "[i]f [she] had to," rather than the later testimony in which defense counsel persuaded her that logically she would need evidence to discard any opinion she might have. *Id.*, at 246a, 250a–252a. Alternate juror Chincharick's testimony is the most ambiguous, as he appears simply to have answered "yes" to almost any question put to him. It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty.

IV

We conclude that the *voir dire* testimony and the record of publicity do not reveal the kind of "wave of public passion" that would have made a fair trial unlikely by the jury that was empaneled as a whole. We also conclude that the ambiguity in the testimony of the cited jurors who were challenged for cause is insufficient to overcome the presumption of correctness owed to the trial court's findings. We therefore reverse.

It is so ordered.

JUSTICE MARSHALL took no part in the decision of this case.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

On page 1 of its opinion the Court carefully states certain facts that give the reader a strong feeling about how this case should be decided. In 1966, Jon Yount confessed that he was responsible for the brutal killing of an 18-year-old high school student. At his first trial in 1966 he testified that he had been temporarily insane at the time, but the jury did not believe him. He was found guilty of rape, as well as murder. These facts were not admissible in evidence at his second trial. What impact, if any, did these inadmissible facts have upon 12 jurors, the 2 alternate jurors, and indeed the trial judge, who listened to the evidence at Yount's second trial in 1970? The Court is satisfied that "community sentiment had softened," *ante*, at 1032, and that the trial judge "did not commit manifest error in finding that the jury as a whole was impartial," *ibid.*, because of the passage of time between 1966 and 1970, and because we all know that "time soothes and erases," *ante*, at 1034.

In order to explain why I disagree with the Court's assessment of the case, it is necessary to enlarge upon its summary of the news coverage of the crime and its aftermath, to supplement its discussion of the examination of the jurors, and to explain why the Court of Appeals properly rejected the trial judge's conclusion that the jury as a whole was impartial. Next, I will discuss my disagreement with the Court's conclusion regarding juror Hrin. Finally, I shall add a word about the more profound issue that a case of this kind raises.

I

Because the Court places such great emphasis on the fact that "this lapse in time had a profound effect on the community and, more important, on the jury, in softening or effacing opinion," *ante*, at 1033, it is important to note that there were, in effect, three chapters in the relevant news coverage: the stories about the crime itself and the first trial in 1966; the stories and events surrounding the State Supreme Court's reversal of the first conviction in 1969; and the stories that were published in 1970 immediately before the second trial began and while the jury was being selected.

The relevant events all occurred in Clearfield County, Pa., where both Yount and the victim lived. It is a rural county, with a population of about 70,000, served by two newspapers with a combined circulation of about 25,000. Not surprisingly, both newspapers gave front-page coverage to the homicide, the pretrial proceedings, and the trial itself. In numerous editions of the DuBois Courier Express, the newspaper carried banner headlines on the front page, news stories and feature articles. App. 520a–641a; Record, Ex. P–1–a, P–1–b, P–1–d, P–1–f to P–1–t. The Clearfield Progress evaluated the trial as the "Top News Story of

1966." Record, Ex. P–2, p. 2. Both papers reported that public interest in the proceedings was "unprecedented." 710 F. 2d 956, 962 (CA3 1983). Moreover, the case also received radio and television coverage, see, *e. g.*, Tr. (Nov. 4, 1970) 64 (juror number 1), 142, 220, 277, and, according to the Court of Appeals, was publicized in out-of-state and national publications. 710 F. 2d, at 962, n. 6.

The articles were extremely detailed.[1] As the Court of Appeals noted, they "related in full [Yount's] detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed [Yount's] defense of temporary insanity, the charge and evidence of rape, and finally [Yount's] conviction on October 7, 1966, of both rape and first-degree murder." *Id.*, at 963; see, *e. g.*, App. 538a–540a, 603a–606a. As this Court notes, "the extensive adverse publicity and the community's sense of outrage were at their height prior to Yount's first trial in 1966," *ante*, at 1032.

In 1969, a divided Supreme Court of Pennsylvania reversed Yount's conviction and ordered a new trial. *Commonwealth* v. *Yount*, 435 Pa. 276, 256 A. 2d 464 (1969), cert. denied, 397 U. S. 925 (1970). This event did not pass unnoticed in Clearfield County. To the contrary, banner headlines announced the reversal. App. 642a; Record, Ex. P–1–v. The local press reprinted the entire dissenting opinion. App. 644a; Record, Ex. P–1–x. And, as the Court of Appeals stated, "a local radio program became a forum in which callers expressed their hostility to [Yount]." 710 F. 2d, at 963. This evidence contradicts the easy assumption that "community sentiment had softened," *ante*, at 1032.

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[1] The "details" of the articles prompted two citizens to write letters to the Courier Express. One letter complained that the paper had "fanned the already poisoned atmosphere of malicious gossip" by putting a picture of the corpse on the front page and by the "repetitive use of gory details." The author added that he thought he "was looking at the National Enquirer." The second letter noted: "Emotional editorializing most certainly has it's *[sic]* place in reporting, but I strenuously object to such when it appears in headline stories. . . . [D]escriptive words that do much to sell newspapers and stir emotions discredit headline reporting and tend to prejudice the suspect regardless of degree of guilt." Record, Ex. P–1–e.

In 1970, Yount was returned to Clearfield County for a retrial in the same courtroom before the same judge who had presided at the first trial—the judge whose erroneous rulings had made the second trial necessary. Yount moved for a change of venue on the ground that the continuing discussion of the case among local residents made it impossible for him to receive a fair trial in Clearfield County. In response the prosecutor argued that a change of venue would be pointless because the case had been so widely publicized throughout the State. The trial court denied the motion, explaining that the recent newspaper items had consisted of purely factual reporting "without editorial comment of any kin[d]." App. 260a. This venue ruling generated a front-page article. *Id.*, at 654a; Record, Ex. P-1-gg. Additionally, during the subsequent *voir dire*, the selection of jurors merited numerous articles and sometimes merited a profile on the juror selected. App. 658a-659a, 661a-663a, 664a-671a; Record, Ex. P-1-ll, P-1-nn to P-1-vv; P-2.

The *voir dire* testimony of one prospective juror, the wife of a minister, sheds a revelatory light on the character of local sentiment on the eve of the second trial. After acknowledging that she had heard many opinions about the case, she was asked:

> "Q. Would your presence in serving as a juror create a difficulty in your parish?
>
> "A. Why yes—when people heard my name on for this—countless people of the church have come to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.
>
> "Q. Is this prejudice, has it been adverse to Mr. Yount?

> "A. Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.
>
> . . . . .
>
> "[T]he church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through.
>
> "Q. Notwithstanding what the Court would tell you, you feel you would be subject to the retributions or retaliation of these people—
>
> "A. I think I would hear about it." App. 25a–27a.

The minister's wife was excused. Her testimony, as well as that of other veniremen who were excused, not only repudiates the notion that the community had all but forgotten the Yount case, but also suggests that some veniremen might have been tempted to understate their recollection of the case because they felt they had a duty to their neighbors "to follow through."[2] In all events, the record clearly establishes that the case was still a "cause célèbre" in Clearfield County in 1970.

II

Even if all the *voir dire* testimony is accepted at face value, it is difficult to understand how a neutral observer could conclude that the jury as a whole was impartial. Before referring to the 12 jurors and 2 alternates who were selected, it is useful to describe the attitude that pervaded the entire venire.

The jury selection took 10 days. *Id.*, at 745a; 710 F. 2d, at 963, 975. Out of an original total of 292 veniremen, the court dismissed 129 because they had been chosen improperly, Tr. 685–686, or had a valid reason for not serving. *Id.*, at 117–118, 492, 1039, 1060–1061. Of the remaining 163 who were questioned, all but 2 had read or heard about the case, *id.*, at 127a–128a, 370a–371a (juror number 4); all but 42 were dismissed for cause. 710 F. 2d, at 963. Of the 121 dismissed for cause, 96 testified that they had firm opinions that could not be changed regardless of what evidence might be presented. Twenty-one others testified that they could only change their opinion if Yount could convince them to do so. In addition, there were nine veniremen who were unsuccessfully challenged for cause who also testified that they had opinions that they could change only if Yount could convince them to do so.[3] *Id.*, at 963–964. Thus, as Judge Hunter summarized for the Court of Appeals:

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[2] As the Court of Appeals pointed out, another prospective juror testified that his opinion had been erased by the passage of time, but his daughter-in-law testified that he had left for jury duty voicing great animosity toward Yount. 710 F. 2d, at 964; App. 766a.

> "When we combine those nine with the 117 veniremen dismissed for cause, we find that a total of 126 out of the 163 veniremen questioned on the case were willing to admit on voir dire that they would carry their opinion[s] into the jury box."[4] *Id.*, at 964.

Turning to the jurors who were actually selected, Judge Hunter accurately noted that "the publicity had reached all but one of the twelve jurors and two alternates finally empanelled." *Ibid.* (footnote omitted); App. 32a, 43a, 71a, 83a, 98a, 120a, 149a, 163a, 176a, 193a, 210a, 235a, 250a. Juror number 1 noted that "it was pretty hard to be here in Clearfield County and not read something in the paper" about the case; that she had read newspaper stories and listened to radio and television stories about the case; and that she had heard the case being discussed by other people. *Id.*, at 32a. Juror number 2 testified that he had read about the case in the newspapers; that "[y]ou could hardly miss it on [radio and television] news"; and that he had formed an opinion about the case. *Id.*, at 43a–44a. The person seated as juror number 3[5] stated that he had read about the case in the newspapers years before the *voir dire* but that he had not formed an opinion. *Id.*, at 210a–211a. Juror number 4, a newcomer to the area, had never heard of the case. *Id.*, at 57a–58a. Juror number 5 "remembered that they had said he was guilty before" and wondered why they were having another trial. *Id.*, at 73a. James F. Hrin, juror number 6, testified that he had an opinion about the case and that he would require the presentation of evidence to change it. *Id.*, at 83a, 85a. He noted that "[i]t's rather difficult to live in DuBois and get the paper and find out what people are talking about—at least the local . . . people without having some opinion or at least reserving some opinion." *Id.*, at 88a. Juror number 7 stated that he had read about the case; that he had formed an opinion; and that he was not sure whether he still had an opinion. *Id.*, at 98a–99a. Juror number 8 testified that she had heard others express opinions concerning the case and she only had an opinion "on just what he said himself—that he was guilty." *Id.*, at 120a, 125a. Juror number 9 stated that she had felt that petitioner was guilty but that presently she would have to hear both sides before forming an opinion. *Id.*, at 150a. Juror number 10 had heard people express their opinions and had on occasion expressed his own opinion about the case. He also stated that he would listen to both sides before forming a present opinion. *Id.*, at 164a–165a. Juror number 11 testified that he had read newspaper accounts of the case but that he had formed no opinion. *Id.*, at 177a. Juror number 12 had read about the case but she had formed no opinion. *Id.*, at 193a–194a. Two alternates were seated over Yount's challenges for cause. Alternate number 1 stated that he had heard people express opinions and ideas about the case; that he had expressed an opinion; that he still had a firm and fixed opinion based on what he read in the newspapers; and that he would require evidence to be presented before he could put his opinion out of his mind. *Id.*, at 235a–240a. Alternate number 2 stated that she had formed a definite opinion and that she would require the production of evidence to change her mind. *Id.*, at 251a–252a.

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[3] The Court of Appeals added:

"Petitioner peremptorily challenged six of those nine veniremen, one was seated as a juror, and the remaining two were seated as alternates after petitioner had exhausted his peremptory challenges." 710 F. 2d, at 964, n. 13.

[4] At this point, the Court of Appeals added the following footnote:

"In addition, we note that twelve other veniremen stated that they had had an opinion at one time but claimed they would not carry it into the jury box. One of the twelve veniremen was dismissed for cause, six were peremptorily challenged by petitioner, and five were seated as jurors." *Id.*, at 964, n. 14.

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[5] The person initially selected as juror number 3 was not able to sit because of personal reasons. Tr. 1060–1061.

The totality of these circumstances convinces me that the trial judge committed manifest error in determining that the jury as a whole was impartial. The trial judge's comment that there was little talk in public about the second trial, *id.*, at 264a, is plainly inconsistent with the evidence adduced during the *voir dire.* Similarly, the trial court's statement that "there was practically no publicity given to this matter through the news media . . . except to report that a new trial had been granted by the Supreme Court," *id.*, at 268a, simply ignores at least 55 front-page articles that are in the record. Record, Ex. P–1, P–2. Further, the trial judge's statement that "almost all, if not all, [of the first 12] jurors . . . had no prior or present fixed opinion," App. 264a, is manifestly erroneous; a review of the record reveals that 5 of the 12 had acknowledged either a prior or a present opinion. *Id.*, at 43a–44a, 83a, 98a–99a, 150a, 164a–165a. The trial judge's "practically no publicity" statement also ignores the first-trial details within the news stories. These included Yount's confessions, testimony, and conviction of rape—all of which were outside of the evidence presented at the second trial. See *id.*, at 643a–644a, 650a, 655a; Record, Ex. P–1–w, P–1–x, P–1–z, P–1–cc, P–1–hh. Under these circumstances, I do not believe that the jury was capable of deciding the case solely on the evidence before it. *Smith* v. *Phillips*, 455

U. S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it").

III

The Court today also rejects Yount's claim that juror Hrin was erroneously seated over his challenge for cause. Before explaining why I disagree with this conclusion, it is necessary to set forth a more complete version of Hrin's *voir dire* testimony than is set forth by the Court.

Hrin, in response to the prosecution's questioning, gave the following testimony:

> "Q. Have you formed any opinion as to the guilt or innocence of Mr. Yount?
>
> "A. To the degree that it was written up in the papers, yes.
>
> "Q. Is this a fixed opinion on your part?
>
> "A. This is sort of difficult to answer. Fixed?
>
> "Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial?
>
> "A. It is very possible. I wouldn't say for sure.
>
> "Q. Do you think you could?
>
> "A. I think I possibly could.
>
> "Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?
>
> "A. I would say not, because I work at a job where I have to change my mind constantly.
>
> "Q. Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question.
>
> "A. If the facts were so presented I definitely could change my mind.
>
> "Q. Would you say you could enter the jury box presuming him to be innocent?

"A. It would be rather difficult for me to answer.

"Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law . . . presented by the Judge?

"A. That I could do." App. 83a–84a.

Yount's counsel elicited further testimony through cross-examination:

"Q. Did I understand Mr. Hrin you would require some—you would . . . require evidence or something before you could change your opinion you now have?

"A. Definitely. If the facts show a difference from what I had originally—had been led to believe, I would definitely change my mind.

"Q. But until you're shown those facts, you would not change your mind—is that your position?

"A. Well—I have nothing else to go on.

"Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

"A. Right, but I would enter it with an open mind.

"Q. In other words, you're saying that while facts were presented you would keep an open mind and after that you would feel free to change your mind?

"A. Definitely.

"Q. But you would not change your mind until the facts were presented?

"A. Right." *Id.*, at 85a–86a.

Yount's counsel subsequently challenged for cause; the court denied the challenge because Hrin "said he could go in with an open mind." *Id.*, at 86a.

First, even if we regard the relevant rulings as findings of fact, Hrin's testimony clearly is sufficient to overcome the presumption of correctness due a state court's factual findings under 28 U. S. C. § 2254(d). The state court's determination is not fairly supported by the record. Hrin not only indicated that he had a previous opinion as to Yount's guilt or innocence, but also that he required evidence produced at trial to dispel that opinion. Further, he stated—pursuant to the prosecution's questioning—that "[i]t would be rather difficult . . . to answer" whether he could enter the jury box presuming Yount's innocence. Under these circumstances, I am convinced that the trial court improperly empaneled Hrin.

More important, however, I believe the Court's analysis regarding whether a juror has a disqualifying opinion is flawed. The Court begins by stating that such a question is one of historical fact, *ante*, at 1036. It then concludes, simply, that this factual finding is entitled to 28 U. S. C. § 2254(d)'s presumption of correctness. Finally, it acknowledges that "[t]here are, of course, factual and legal questions to be considered in deciding whether a juror is qualified," *ante*, at 1037, n. 12, and cites as one authority *Reynolds* v. *United States*, 98 U. S. 145 (1879).[6]

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[6] The Court attempts to justify its treatment of *Reynolds* by quoting from a passage in that case that begins with: "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words." *Ante*, at 1037, n. 12 (quoting 98 U. S., at 156–157). The excerpt from *Reynolds* quoted by the Court dealt with the question whether a juror's testimony was truthful—specifically whether a prospective juror was falsely seeking to disqualify himself. In this case the question is whether Hrin's testimony, including his acknowledged opinion about Yount's guilt, raised a presumption of partiality. Whether the testimony of a witness is true or false is a question of fact; whether his statement raises a presumption of partiality is a mixed question of law and fact. The fully quoted relevant passage of *Reynolds* demonstrates the former point:

"The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when on examination, it turns out that no real disqualification exists. *In such cases* the manner of the juror while testifying is oftentimes more indicative of the

Contrary to the Court, I believe that whether a juror has a disqualifying opinion is a mixed question of law and fact. The proper starting point of analysis is *Reynolds* v. *United States, supra.* In that case, the defendant excepted to the trial court's decision to reject several challenges for cause that were based on juror testimony during *voir dire. Id.*, at 146–147. This Court upheld the trial court's decision. *Id.*, at 157. Before reaching its ultimate conclusion, the Court stated:

> "The theory of law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have this effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among the best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that

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real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon *such a question* of fact except in a clear case." *Id.*, at 156–157 (emphasis added).

The Court also cites as authority *Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam)*, and *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). Neither of those cases was correctly decided. Moreover, the latter case is plainly inapplicable because it involved the voluntariness of guilty pleas, not juror partiality. The former involved an allegation of juror partiality that arose after the trial began.

> character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest." *Id.*, at 155–156.

Irvin v. *Dowd*, 366 U. S. 717 (1961), extended *Reynolds* to habeas corpus proceedings. Initially, *Irvin* noted that a presumption of a prospective juror's impartiality is not rebutted "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 366 U. S., at 723. Next, the Court affirmed that a proper inquiry may demonstrate "'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality,'" *ibid.* (quoting *Reynolds* v. *United States*, *supra*, at 156), and that this inquiry is "'one of mixed law and fact.'" 366 U. S., at 723.

Thus, *Reynolds* and *Irvin* teach that the question whether a juror has an opinion that disqualifies is a mixed one of law and fact. Therefore, one cannot apply the presumption of correctness found in 28 U. S. C. § 2254(d) because the statutory language by definition applies only to the factual determinations of state courts. Applying the proper analytical framework, I believe that Hrin's testimony clearly raised a presumption of partiality. Therefore, the trial judge committed manifest error by improperly empaneling Hrin.[7]

There is a special reason to require independent review in a case that arouses the passions of the local community in which an elected judge is required to preside. Unlike an appointed federal judge with life tenure, an elected judge has reason to be concerned about the community's reaction to his disposition of highly publicized cases. Even in the federal judiciary, some Circuits have determined that it is sound practice to have the retrial of a case assigned to a different judge than the one whose erroneous ruling made another trial necessary; for though the risk that a judge will subconsciously strive to vindicate the result reached at the first trial may be remote, as long as human beings preside at trials, that possibility cannot be ignored entirely.

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[7] The Court states that it "do[es] not think [*Irvin*'s] analysis can be extended to a federal habeas corpus case in which the partiality of an individual juror is placed in issue." *Ante*, at 1036. The validity of *Irvin* (habeas corpus case) and of *Reynolds* (individual jurors), and the inapplicability of 28 U. S. C. § 2254(d), dispose of any meaningful reason not to "extend" these cases to federal habeas corpus cases in which the partiality of individual jurors is placed in issue.

IV

Two additional and somewhat disturbing questions merit comment: (1) why did this Court exercise its discretionary jurisdiction to review this case; and (2) even if the Court of Appeals' analysis of the case is entirely correct, why should those federal judges order the great writ of habeas corpus to issue for the benefit of a prisoner like Yount, who, it would seem, is guilty of a heinous offense?

The answer to the question why the Court grants certiorari in any given case usually involves considerations of both fact and law. It appears that the facts motivated the Court to select this case for plenary review. The facts that had such a motivating impact on this Court—that the conviction of a confessed murderer of a high school student had been set aside by an appellate court—also, I believe, must have had an emotional and unforgettable impact on the residents of Clearfield County. The desire to "follow through"—to do something about such an apparent miscarriage of justice—is difficult for judges as well as laymen to resist.[8]

It should not be forgotten that Yount has already been incarcerated for 18 years. If, as the Court of Appeals held, he has not yet been found guilty beyond a reasonable doubt in a fair trial, the possibility remains that he has already received a greater punishment than is warranted. Of much greater importance is our dedication to the principle that guilt or innocence of a criminal offense in our society is not to be decided by executive fiat or by popular vote. This is a principle that affords protection for every citizen in the United States. Justice Frankfurter stated this point in his concurrence in *Irvin* v. *Dowd:*

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[8] As I recently noted, in 19 consecutive cases in which the Court exercised its discretion to decide a criminal case summarily, the Court made sure that an apparently guilty defendant was not given too much protection by the law. See *Florida* v. *Meyers*, 466 U. S. 380, 385–387, and n. 3 (1984). The string of consecutive summary victories for the prosecution now stands at 20. See *Massachusetts* v. *Upton*, 466 U. S. 727 (1984) *(per curiam)*.

> "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him." 366 U. S., at 729.

I would affirm the judgment of the Court of Appeals.

REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1054 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FROM MAY 21 THROUGH JUNE 26, 1984

May 21, 1984

Appeals Dismissed

No. 83–592. **Ostrosky et al. *v.* Alaska.** Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. Justice Blackmun and Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 667 P. 2d 1184.

No. 83–1356. **Reimer *v.* California;** and

No. 83–6156. **Enright *v.* California.** Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied.

No. 83–6494. **Rettig *v.* Kent City School District et al.** Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 720 F. 2d 463.

Certiorari Granted—Vacated and Remanded

No. 82–508. **United States *v.* Dunn.** C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oliver* v. *United States*, 466 U. S. 170 (1984). Reported below: 674 F. 2d 1093.

Certiorari Dismissed. (See No. 81–1636, *infra.*)

Vacated and Remanded After Certiorari Granted

No. 81–1636. **Florida *v.* Brady et al.** Sup. Ct. Fla. [Certiorari granted, 456 U. S. 988.] Motion of California Farm Bureau Federation et al. for leave to file a brief as *amici curiae* granted. Writ of certiorari as to respondent Brady is dismissed, it appearing that the Circuit Court of Florida, Martin County, has accepted the State's *nolle prosequi.* Judgment as to the remaining respondents is vacated, and the case is remanded for further consideration in light of *Oliver* v. *United States*, 466 U. S. 170 (1984).

Miscellaneous Orders

No. — – —. LAUCHLI *v.* UNITED STATES. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the motion.

No. — – —. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES. Motion to waive the requirement that the trial court opinions be printed as an appendix to the petition for writ of certiorari denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant the motion.

No. A–852. VANDROSS *v.* PALMETTO STATE SAVINGS & LOAN ASSN. Sup. Ct. S. C. Application for stay and reinstatement of prior order, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–881 (83–6350). MCCORQUODALE *v.* BALKCOM, WARDEN, ET AL., 466 U. S. 954. Application to suspend the effect of the order denying the petition for writ of certiorari, addressed to JUSTICE BRENNAN and referred to the Court, is granted pending further order of the Court. Execution of the sentence of death, scheduled for May 24, 1984, is stayed pending further order of the Court.

No. D–395. IN RE DISBARMENT OF SHAPIRO. Disbarment entered. [For earlier order herein, see 464 U. S. 1067.]

No. D–403. IN RE DISBARMENT OF CUNNINGHAM. Disbarment entered. [For earlier order herein, see 465 U. S. 1063.]

No. D–414. IN RE DISBARMENT OF BLOCK. Disbarment entered. [For earlier order herein, see 465 U. S. 1096.]

No. D–427. IN RE DISBARMENT OF STONER. It is ordered that Jesse Benjamin Stoner, of Marietta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–430. IN RE DISBARMENT OF LEVINSON. It is ordered that Robert Charles Levinson, of Indianapolis, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–432. In re Disbarment of Graffagnino. It is ordered that Anthony J. Graffagnino, Jr., of Metairie, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–433. In re Disbarment of Gramza. It is ordered that Allen E. Gramza, of Racine, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–56. Heckler, Secretary of Health and Human Services *v.* Community Health Services of Crawford County, Inc., et al. C. A. 3d Cir. [Certiorari granted, 464 U. S. 812.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 83–997. Trans World Airlines, Inc. *v.* Thurston et al. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1065]; and

No. 83–1325. Air Line Pilots Assn., International *v.* Thurston et al. C. A. 2d Cir. [Certiorari granted, 466 U. S. 926.] Motion of United Air Lines, Inc., for leave to file a brief as *amicus curiae* granted.

No. 83–1158. Estate of Thornton et al. *v.* Caldor, Inc. Sup. Ct. Conn. [Certiorari granted, 465 U. S. 1078.] Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 83–6570. In re Buckmore. Petition for writ of mandamus denied.

Certiorari Granted

No. 83–1307. United States *v.* Powell. C. A. 9th Cir. Certiorari granted. Reported below: 708 F. 2d 455 and 719 F. 2d 1480.

No. 83–1330. United States *v.* Hensley. C. A. 6th Cir. Certiorari granted. Reported below: 713 F. 2d 220.

No. 83-1622. BRANDON ET AL. *v.* HOLT, DIRECTOR OF POLICE FOR THE CITY OF MEMPHIS, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 719 F. 2d 151.

No. 83-1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83-1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83-6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. Motions of James Loudermill for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 721 F. 2d 550.

Certiorari Denied. (See also Nos. 83-1356, 83-6156, and 83-6494, *supra.*)

No. 83-1252. NEURO AFFILIATES, DBA CROSSROADS HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 746.

No. 83-1257. SAFEWAY STORES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 714 F. 2d 567.

No. 83-1350. MOORE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1444.

No. 83-1365. MASTRANGELO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 13.

No. 83-1402. CONDON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 468 A. 2d 1348.

No. 83-1414. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES *v.* RUSSELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 714 F. 2d 1332.

No. 83-1447. BIRMINGHAM LINEN SERVICE *v.* BELL. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 1552.

No. 83-1467. VAINIO *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 466 A. 2d 471.

No. 83-1490. CITY OF ALTOONA, PENNSYLVANIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 4.

No. 83–1493. General Hospitals of Humana, Inc. *v.* Arkansas Statewide Health Coordinating Council et al. Sup. Ct. Ark. Certiorari denied. Reported below: 280 Ark. 443 and 281 Ark. 98, 660 S. W. 2d 906.

No. 83–1495. Thorsteinsson et al. *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 1365.

No. 83–1538. Lafferty *v.* Alyeska Pipeline Service et al. Sup. Ct. Alaska. Certiorari denied.

No. 83–1565. Lomas *v.* Northwestern Lehigh School District et al. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 669.

No. 83–1566. Hunter *v.* Reardon Smith Lines, Ltd. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1108.

No. 83–1576. Sutton et al. *v.* Weirton Steel Division of National Steel Corp. et al.; and

No. 83–1584. Brunner et al. *v.* National Steel Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 724 F. 2d 406.

No. 83–1589. City of North Olmstead, Ohio *v.* Greater Cleveland Regional Transit Authority. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1284.

No. 83–1591. Charter Consolidated, Ltd., et al. *v.* Barber et al. Super. Ct. Pa. Certiorari denied. Reported below: 317 Pa. Super. 285, 464 A. 2d 323.

No. 83–1594. LaScala *v.* Burlington Northern Inc. Sup. Ct. Minn. Certiorari denied.

No. 83–1597. Rees *v.* County of Los Angeles. Ct. Sp. App. Md. Certiorari denied. Reported below: 57 Md. App. 804, 471 A. 2d 1141.

No. 83–1604. Franklin Stone Products, Inc. *v.* Dawson et al. Ct. App. Wis. Certiorari denied.

No. 83–1606. Kennedy *v.* Board on Professional Responsibility of the Supreme Court of Delaware et al. Sup. Ct. Del. Certiorari denied. Reported below: 472 A. 2d 1317.

No. 83-1607. CURLEY *v.* CURLEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-1608. WINSLOW ET AL. *v.* WILLIAMS ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-1627. SAFIR *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 231 U. S. App. D. C. 63, 718 F. 2d 475.

No. 83-1628. SHELTON ET AL. *v.* CARLTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 203.

No. 83-1630. SCHWEGMANN, AKA BLACKLEDGE *v.* SCHWEGMANN ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 441 So. 2d 316.

No. 83-1650. SUTHOFF ET AL. *v.* YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 133.

No. 83-1658. MCMANUS *v.* VILLAGE OF SOUTHHAMPTON, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1437.

No. 83-1672. HEIL CO. *v.* MELLER. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 1297.

No. 83-1674. YOUNG *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 167, 725 F. 2d 126.

No. 83-1696. PITEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 53.

No. 83-1699. GIGANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 78.

No. 83-1703. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1463.

No. 83-1714. MUZYCHKA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 1061.

No. 83-1718. DECARLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1449.

No. 83-1737. Consolidated X-Ray Service Corp. *v.* Bugher et al. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 83-5855. Moss *v.* United States. Ct. App. D. C. Certiorari denied.

No. 83-6053. Majcina *v.* Majcina et al. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 116 Ill. App. 3d 1176, 462 N. E. 2d 1297.

No. 83-6239. Melchor *v.* Los Angeles County Department of Adoptions. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6249. Mileski *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 902.

No. 83-6254. Maldonado *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 675, 460 N. E. 2d 239.

No. 83-6275. Roberts *v.* Marshall, Superintendent, Southern Ohio Correctional Facility. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83-6300. Wells *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-6389. Crawford *v.* Mintzes, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 683.

No. 83-6470. Manago *v.* Ohio. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 83-6473. Vaughn *v.* White et al. C. A. 8th Cir. Certiorari denied.

No. 83-6474. Seibert *v.* Mintzes, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83-6482. Casey *v.* Smith, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 83-6483. Brown et al. *v.* Newsome, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 83-6486. LUCAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 116 Ill. App. 3d 1172, 462 N. E. 2d 1294.

No. 83-6488. BROWN *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6497. WASHINGTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 661 S. W. 2d 900.

No. 83-6503. CARLOCK *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 1168, 470 N. E. 2d 663.

No. 83-6512. COLUMBO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 882, 455 N. E. 2d 733.

No. 83-6513. MCDONALD *v.* LEECH, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83-6526. ASHLEY *v.* GRANT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1460.

No. 83-6537. HOLLAND *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. D. C. Cir. Certiorari denied.

No. 83-6545. PAYTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 83-6546. MILLER *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83-6551. MA *v.* FIRST NATIONAL CORPORATION OF APPLETON ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-6584. GARTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83-6587. SCHRONCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 91.

No. 83-6593. RODRIQUEZ-MORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 753.

No. 83-6600. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 1501.

No. 83–6602. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83–6613. SAUNDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83–6620. SCARBOROUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 580.

No. 82–2030. ANDERSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 658 P. 2d 501.

No. 83–67. INGLE *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 8 Ark. App. 218, 655 S. W. 2d 2.

No. 83–988. BERRONG ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 712 F. 2d 1370.

No. 83–1011. OLSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 83–5027. BENTLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 706 F. 2d 1498.

No. 83–623. JAMES ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 1st Cir. Motion of Center for Constitutional Rights et al. for leave to file a brief as *amici curiae* granted. Motion of petitioners to strike brief of Native American Rights Fund for Gay Head Tribe denied. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 716 F. 2d 71.

No. 83–892. CALIFORNIA STATE DEPARTMENT OF EDUCATION ET AL. *v.* LOS ANGELES BRANCH, NAACP, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 714 F. 2d 946.

No. 83–906. UNITED STATES *v.* RYLANDER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 714 F. 2d 996.

No. 83-1355. ORANGE COUNTY ET AL. *v.* WOOD ET AL. C. A. 11th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 1543.

No. 83-1455. WILK ET AL. *v.* AMERICAN MEDICAL ASSN. ET AL.; and

No. 83-1602. AMERICAN MEDICAL ASSN. ET AL. *v.* WILK ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 719 F. 2d 207.

No. 83-1587. NAARTEX CONSULTING CORP. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 232 U. S. App. D. C. 293, 722 F. 2d 779.

No. 83-6312. ANTONELLI *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 721 F. 2d 615.

No. 83-1600. EBERT ET UX. *v.* RITCHEY ET AL. Ct. Sp. App. Md. Motion of respondent for damages denied. Certiorari denied. Reported below: 54 Md. App. 388, 458 A. 2d 891.

No. 83-1712. CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO *v.* NORFOLK & WESTERN RAILWAY CO. Sp. Ct. R. R. R. A. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 582 F. Supp. 1552.

No. 83-6421. CLARK *v.* FLORIDA. Sup. Ct. Fla.;

No. 83-6453. PARKS *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 83-6490. CONE *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 83-6610. BARFIELD *v.* HARRIS, SUPERINTENDENT, NORTH CAROLINA CORRECTIONAL CENTER FOR WOMEN, ET AL. C. A. 4th Cir.; and

No. 83-6625. LAWS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 83-6421, 443 So. 2d 973; No. 83-6490, 665 S. W. 2d 87; No. 83-6610, 719 F. 2d 58; No. 83-6625, 661 S. W. 2d 526.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-6435. CARTER *v.* CITY OF BIRMINGHAM ET AL. Sup. Ct. Ala. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 444 So. 2d 373.

Rehearing Denied

No. 83-1000. J. D. COURT, INC. *v.* UNITED STATES, 466 U. S. 927. Petition for rehearing denied.

No. 82-6591. WILSON *v.* UNITED STATES, 464 U. S. 867. Motion for leave to file petition for rehearing denied.

MAY 29, 1984

Appeal Dismissed

No. 83-1320. BELL *v.* TOWNSHIP OF EAGLESWOOD. Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question.

Vacated and Remanded on Appeal

No. 83-1479. AYERS ET AL. *v.* WINTER ET AL. Appeal from D. C. N. D. Miss. Judgment vacated and case remanded for entry of a fresh judgment from which a timely appeal may be taken to the United States Court of Appeals for the Fifth Circuit.

Certiorari Granted—Vacated and Remanded

No. 83-1287. STRICKLAND, WARDEN, ET AL. *v.* KING. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 714 F. 2d 1481.

No. 83-5500. SOLOMON *v.* HARRIS, WARDEN, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland* v. *Washington*, 466

U. S. 668 (1984). JUSTICE MARSHALL would grant certiorari and set case for oral argument. Reported below: 742 F. 2d 1438.

No. 83–5636. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 665 P. 2d 1205.

JUSTICE BRENNAN and JUSTICE MARSHALL:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83–6125. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 669 P. 2d 285.

JUSTICE BRENNAN and JUSTICE MARSHALL:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83–6413. BURGER *v.* ZANT, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I(B) presented by the petition. The opinion of the United States District Court for the Southern District of Georgia on this question, which the Court of Appeals adopted without separate discussion, may be flawed in at least one respect. In judging the reasonableness of counsel's decision not to present character evidence, the District Court apparently mistook the arguments counsel made at petitioner's *first*, ultimately vacated, sentencing for the arguments counsel made at petitioner's *second* sentencing, the proceeding whose result is challenged in this petition. *Blake* v. *Zant*, 513 F. Supp. 772, 796–798 (1981). Petitioner is entitled to an assessment of his ineffectiveness claim unaffected by this, as well as by any other, error. Accordingly, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit with instructions to reconsider the effectiveness of counsel's assistance at petitioner's second sentencing and for further consideration in light of *Strickland* v. *Washington,* 466 U. S. 668 (1984). JUSTICE MARSHALL would grant certiorari for the reasons stated in the dissenting opinion of Judge Johnson and set the case for oral argument. Reported below: 718 F. 2d 979.

JUSTICE BRENNAN:

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

Miscellaneous Orders

No. — — ——. LAL *v.* CBS, INC. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. — — ——. MARSHALL *v.* BURLINGTON NORTHERN INC. Motion to accept the petition for writ of certiorari as timely filed, or to waive the Rules of this Court, denied.

No. A-816 (83-1685). CORBIN *v.* ALASKA. Ct. App. Alaska. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-900. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Petition for allowance of additional compensation to the Special Master granted, and payments as requested in prayers 1, 2, and 3 are allowed. Further consideration of the remaining prayers deferred until further order of the Court. JUSTICE MARSHALL took no part in the consideration or decision of this matter. [For earlier order herein, see, *e. g.*, 466 U. S. 956.]

No. 83-6536. CIRILLO *v.* REPUBLIC STEEL CORP. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 19, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Noted

No. 83–1620. FIRST NATIONAL BANK OF ATLANTA, AS SUCCESSOR IN INTEREST TO FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA *v.* BARTOW COUNTY BOARD OF TAX ASSESSORS ET AL. Appeal from Sup. Ct. Ga. Probable jurisdiction noted. Reported below: 251 Ga. 831, 312 S. E. 2d 102.

Certiorari Granted

No. 83–1476. UNITED STATES *v.* DANN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 706 F. 2d 919.

No. 83–1632. HARPER & ROW, PUBLISHERS, INC., ET AL. *v.* NATION ENTERPRISES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 723 F. 2d 195.

No. 83–1292. WAYTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 710 F. 2d 1385.

Certiorari Denied

No. 83–595. SNOW ET AL. *v.* QUINAULT INDIAN NATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1319.

No. 83–871. FOSTER, SHERIFF OF ROANOKE COUNTY, VIRGINIA, ET AL. *v.* LANKFORD. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 896.

No. 83–1067. MADDOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 905.

No. 83–1155. JACKSON *v.* UNITED STATES;
No. 83–6086. BUMGARDNER *v.* UNITED STATES; and
No. 83–6092. ELEAZAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 F. 2d 1481.

No. 83–1261. LYDDAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 721 F. 2d 873.

No. 83-1400. BISCAYNE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1499.

No. 83-1407. LANGUIRAND *v.* CITY OF PASS CHRISTIAN, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 220.

No. 83-1420. GAMMAL *v.* HAMROCK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 725 F. 2d 664.

No. 83-1426. MCKISSICK PRODUCTS CO. ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 719 F. 2d 350.

No. 83-1445. HAMPSHIRE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 459.

No. 83-1457. RIVERA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 453.

No. 83-1470. MID-SOUTH GRIZZLIES ET AL. *v.* NATIONAL FOOTBALL LEAGUE. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 772.

No. 83-1536. ELLIOTT ET AL. *v.* GROUP HOSPITAL SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 714 F. 2d 556.

No. 83-1617. COLEMAN *v.* AMERICAN CYANAMID CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 820.

No. 83-1621. DETROIT PLASTIC MOLDING CO. *v.* USM CORP. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83-1626. JOHNSON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 674 P. 2d 1077.

No. 83-1631. KNEELAND *v.* BLOOM TOWNSHIP HIGH SCHOOL DISTRICT NO. 206 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1104.

No. 83-1637. DRAPER *v.* UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 387, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 683.

No. 83-1642. U. S. ELECTRICAL MOTORS, A DIVISION OF EMERSON ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 315.

No. 83-1645. STRUEMPH ET AL. *v.* MCAULIFFE. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 661 S. W. 2d 559.

No. 83-1649. BEIMERT *v.* BURLINGTON NORTHERN INC. C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 412.

No. 83-1736. SEGAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 83-1741. HYUN JOON CHUNG ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 1471.

No. 83-1746. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 83-1763. LLAGUNO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-1797. GRAHAM *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 678 P. 2d 1043.

No. 83-6196. SCHAFLANDER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 1024.

No. 83-6200. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 864.

No. 83-6243. CHARLES F. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 474, 458 N. E. 2d 801.

No. 83-6340. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 599.

No. 83-6344. DREW ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 551.

No. 83-6370. STRONG *v.* UNITED STATES; and
No. 83-6378. REDWINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 315.

No. 83-6399. OBERLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-6406. VALLEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83-6492. KNOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83-6514. TILLI *v.* CAPOBIANCO ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-6515. PERRY *v.* SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 83-6523. KELT, ADMINISTRATOR OF THE ESTATE OF KELT *v.* QUEZADA ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 121.

No. 83-6529. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6538. GRIFFITH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 687.

No. 83-6539. GRECK *v.* SUPERIOR COURT OF YOLO COUNTY, CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 83-6541. HARRISON *v.* GALLAGHER ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-6544. VIPPERMAN *v.* HOUSEWRIGHT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 83-6554. CARNIVALE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 114 Wis. 2d 603, 340 N. W. 2d 202.

No. 83-6557. ANTONELLI *v.* SCHRYVER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 913.

No. 83-6573. HOLLOWAY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 724 F. 2d 1102.

No. 83-6590. DURHAM *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-6599. BURKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-6601. EMERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 147.

No. 83-6604. VENKATESAN *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL UNION 545-D. C. A. 2d Cir. Certiorari denied.

No. 83-6606. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 662.

No. 83-6622. TERRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83-6624. CHILCOTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 1498.

No. 83-6629. KAVANAUGH *v.* SPERRY UNIVAC. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 83-6635. AISPURO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6637. KOPPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6639. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83-6640. BEERBOWER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 682.

No. 83-6650. RANDAZZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 729 F. 2d 10.

No. 83-6662. LININGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 82-1691. ILLINOIS *v.* WILLIAMS. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this motion and this petition. Reported below: 93 Ill. 2d 309, 444 N. E. 2d 136.

No. 83–147. ILLINOIS *v.* RAINGE. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this motion and this petition. Reported below: 112 Ill. App. 3d 396, 445 N. E. 2d 535.

No. 82–7003. STANLEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 697 F. 2d 955.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83–1072. SOLEM, WARDEN, ET AL. *v.* LUFKINS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 716 F. 2d 532.

No. 83–1389. TEXAS *v.* BENSON. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 S. W. 2d 708.

No. 83–1138. PEED ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioners to strike brief of the United States denied. Certiorari denied. Reported below: 717 F. 2d 1481.

No. 83–1229. LONGSTAFF *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 716 F. 2d 1439.

No. 83–1345. UNION CARBIDE CORP. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 231 U. S. App. D. C. 79, 718 F. 2d 1117.

No. 83–1656. PEMBAUR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 9 Ohio St. 3d 136, 459 N. E. 2d 217.

No. 83-5088. GILBERT *v.* SOUTH CAROLINA. Ct. Common Pleas, Lexington County, S. C.;

No. 83-5092. GLEATON *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas, Lexington County, S. C.;

No. 83-5148. HIGH *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;

No. 83-5432. BALDWIN *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir.;

No. 83-5716. CORN *v.* ZANT, WARDEN. C. A. 11th Cir.;

No. 83-6090. BERRYHILL *v.* FRANCIS, WARDEN. Sup. Ct. Ga.;

No. 83-6519. MCCALL *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 83-6549. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-5148, 250 Ga. 693, 300 S. E. 2d 654; No. 83-5432, 704 F. 2d 1325; No. 83-5716, 708 F. 2d 549; No. 83-6519, 139 Ariz. 147, 677 P. 2d 920; No. 83-6549, 445 So. 2d 323.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-5826. JOHNSON *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

Rehearing Denied

No. 83-1436. WHITE *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. ET AL., 466 U. S. 938. Petition for rehearing denied.

MAY 31, 1984

Miscellaneous Order

No. A-980. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* FORD. Application of the State of Florida to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated May 30, 1984, staying the execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL join in the order of the Court. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would grant the State's application to vacate the stay of execution of sentence of death.

JUSTICE POWELL, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, and with whom JUSTICE STEVENS joins in Part I, concurring.

On May 30, 1984, the Court of Appeals for the Eleventh Circuit, reversing the judgment of the District Court, granted respondent Ford a stay of execution of the sentence of death set for no later than noon on Friday, June 1, 1984. *Ford* v. *Strickland,* 734 F. 2d 538. The Court of Appeals granted the stay on two separate grounds. First, it stated that Ford's claim that he is entitled under the Eighth and Fourteenth Amendments to a procedural due process hearing to determine whether he is currently insane (the "competency claim") raises substantial issues that warrant review. Second, the Court of Appeals held that Ford's claim that Florida administers the death penalty in a discriminatory manner on the basis of race and other impermissible factors (the "discrimination claim") should be held pending en banc consideration by the Eleventh Circuit of *Spencer* v. *Zant,* 715 F. 2d 1562, vacated for rehearing en banc, 715 F. 2d 1583 (1983).

I

The Court of Appeals found that Ford's claim of entitlement to a due process hearing on competency to be executed did not constitute an abuse of the writ of habeas corpus, and held that the District Court had erred in holding to the contrary. On the merits, the Court of Appeals stated that this claim "raises substantial procedural and substantive Eighth and Fourteenth Amendment grounds" that warrant review of Ford's federal habeas petition. The Court of Appeals reviewed the relevant record. In view of its findings, I cannot say in this case that the court abused its discretion in staying Ford's execution on this issue.* I concur, therefore, in the order of the Court denying the State's application to vacate the stay.

II

The Court of Appeals also held that a stay of execution should be granted so that Ford's discrimination claim could be held pending en banc hearing and decision by that court in *Spencer* v. *Zant, supra.* The District Court had found that Ford had abused the writ by failing to raise this claim in his first federal habeas petition. The Court of Appeals provides no convincing explanation for ignoring that factual determination. Moreover, the Florida Supreme Court held that Ford's discrimination claim was procedurally barred for failure to present it in a motion for postconviction relief as required by Florida Rule of Criminal Procedure 3.850. *Ford* v. *Wainwright,* 451 So. 2d 471 (1984). Neither the Court of Appeals nor the District Court found cause and prejudice to excuse this procedural bar. See *Engle* v. *Isaac,* 456 U. S. 107 (1982). Finally, we have held in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted. See *Sullivan* v. *Wainwright,* 464 U. S. 109 (1983); *Wainwright* v. *Adams,* 466 U. S. 964 (1984). I am of the opinion that the Court of Appeals abused its discretion in also granting a stay of execution on Ford's discrimination claim pending its decision in *Spencer* v. *Zant, supra.*

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*This Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane, and I imply no view as to the merits of this issue.

JUSTICE STEVENS, having joined in Part I above, is of the view that it is unnecessary to consider the discrimination claim presented in Part II.

JUNE 4, 1984

Dismissal Under Rule 53

No. 83-1745. SULLIVAN *v.* CONSOLIDATED RAIL CORPORATION. Sup. Ct. Ohio. Certiorari dismissed under this Court's Rule 53. Reported below: 9 Ohio St. 3d 105, 459 N. E. 2d 513.

Affirmed on Appeal

No. 83-1526. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. Affirmed on appeal from D. C. N. J. Reported below: 580 F. Supp. 1259.

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

For the reasons I stated when the Court denied the appellants' application for a stay of the District Court's order, *Karcher* v. *Daggett,* 466 U. S. 910, 911 (1984) (dissenting opinion), I would note probable jurisdiction and set the case for oral argument.

No. 83–1677. BROWN, SECRETARY OF STATE OF OHIO *v.* BRANDON ET AL.;

No. 83–1678. CELESTE, GOVERNOR OF OHIO *v.* BRANDON ET AL.; and

No. 83–1679. FLANAGAN ET AL. *v.* BRANDON ET AL. Affirmed on appeals from D. C. S. D. Ohio. JUSTICE POWELL and JUSTICE REHNQUIST would note probable jurisdiction and set cases for oral argument.

Appeals Dismissed

No. 82–1564. LONEWOLF *v.* LONEWOLF. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 99 N. M. 300, 657 P. 2d 627.

No. 83–1648. PICKERING *v.* CITY OF BUFFALO, NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 742 F. 2d 1436.

No. 83–1685. CORBIN *v.* ALASKA. Appeal from Ct. App. Alaska dismissed for want of substantial federal question. Reported below: 672 P. 2d 156.

No. 83–1731. COHRAN *v.* STATE BAR OF GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 83–277. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS *v.* HOME SAVINGS & LOAN ASSOCIATION OF LAWTON, OKLAHOMA. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Community Health Services of Crawford County, Inc.*, *ante*, p. 51. Reported below: 695 F. 2d 1251.

No. 83–1149. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* STARNES ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Ringer*, 466 U. S. 602 (1984). JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 715 F. 2d 134.

Miscellaneous Orders

No. — — ——. FERNANDEZ *v.* KINER ET AL. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. — — ——. HILL *v.* WATTS ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-959. MAYORAL ET AL. *v.* JEFFCO AMERICAN BAPTIST RESIDENCES, INC., ET AL. The order entered by JUSTICE WHITE on May 25, 1984, is vacated, and the application for stay of mandate of the United States Court of Appeals for the Tenth Circuit is denied.

No. D-411. IN RE DISBARMENT OF SHEEHY. Disbarment entered. [For earlier order herein, see 465 U. S. 1096.]

No. D-416. IN RE DISBARMENT OF ROUNDTREE. Dovey J. Roundtree, of Washington, D. C., having requested to resign as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 2, 1984 [466 U. S. 921], is hereby discharged.

No. D-434. IN RE DISBARMENT OF SCHETTINO. It is ordered that John C. Schettino, of Bedford Hills, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83-997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1065]; and

No. 83-1325. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 466 U. S. 926.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for divided argument granted. Motion of Trans World Airlines, Inc., for divided argument granted, and a total of 15 minutes allotted for that purpose. Motion of Air Line Pilots Association for divided argument granted, and a total of 15 minutes allotted for that purpose.

No. 83-1020. OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1078.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 83-1158. ESTATE OF THORNTON ET AL. *v.* CALDOR, INC. Sup. Ct. Conn. [Certiorari granted, 465 U. S. 1078.] Motion of National Right to Work Legal Defense Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 83-1386. LEGGETT, COLLECTOR OF REVENUE IN THE CITY OF ST. LOUIS, ET AL. *v.* LIDDELL ET AL.;

No. 83-1721. MISSOURI ET AL. *v.* LIDDELL ET AL.; and

No. 83-1838. NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Motion of petitioners in No. 83-1386 and respondents Leggett et al. in Nos. 83-1721 and 83-1838 to expedite consideration of the petitions for writs of certiorari denied.

No. 83-1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83-1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 83-6577. IN RE SOMMER; and

No. 83-6592. IN RE SEITU. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 83-1394. UNITED STATES ET AL. *v.* LOCKE ET AL. Appeal from D. C. Nev. Probable jurisdiction noted. Reported below: 573 F. Supp. 472.

Certiorari Granted

No. 83-1590. FRANCIS, WARDEN *v.* FRANKLIN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 720 F. 2d 1206 and 723 F. 2d 770.

Certiorari Denied. (See also Nos. 82-1564 and 83-1648, *supra.*)

No. 83-422. GROUP HEALTH INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 83-1128. SEAY, AKA DERRINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1279.

No. 83-1273. LEWIS SERVICE CENTER, INC. *v.* MACK TRUCKS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 842.

No. 83-1374. CODY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 1052.

No. 83-1406. VANCE *v.* WHIRLPOOL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 483 and 716 F. 2d 1010.

No. 83-1413. LEMIRE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 100, 720 F. 2d 1327.

No. 83-1438. SELMAN, EXECUTRIX OF THE ESTATE OF SELMAN, ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 877.

No. 83-1501. FAUST, ADMINISTRATRIX OF THE ESTATE OF FAUST, ET AL. *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 934.

No. 83-1572. FLANNERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 108.

No. 83-1581. WARD *v.* SENTRY TITLE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 941 and 727 F. 2d 1368.

No. 83-1640. TEMPLETON ET UX. *v.* ARSENAL SAVINGS ASSN. ET AL. Ct. App. Ind. Certiorari denied. Reported below: 451 N. E. 2d 1135.

No. 83-1653. SCRIPPS-HOWARD BROADCASTING CO. *v.* EMBERS SUPPER CLUB, INC. Sup. Ct. Ohio. Certiorari denied. Reported below: 9 Ohio St. 3d 22, 457 N. E. 2d 1164.

No. 83-1661. BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83–1664. BAIRD ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 724 F. 2d 1032.

No. 83–1666. TURNER *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83–1676. SAUNDERS *v.* MARSH, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83–1682. MARTIN STEEL CORP. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (OWATONNA ELEVATOR CO. ET AL., REAL PARTIES IN INTEREST). C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83–1686. EASTERN BANCORPORATION *v.* FORMER OFFICERS AND DIRECTORS OF EASTERN BANCORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 667.

No. 83–1761. CORWIN ET AL. *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 724 F. 2d 1577.

No. 83–1768. THOMAS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83–1772. WOOLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 83–1775. BECKER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 83–1780. ZIMMERMAN *v.* GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 85.

No. 83–1806. MCANLIS *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 334.

No. 83–1809. RHODES *v.* HOGAN. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–1824. JENNINGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 436.

No. 83-6252. CARTER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 442 So. 2d 150.

No. 83-6282. MOTHERSHED *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6303. JOHNSTON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 673 P. 2d 844.

No. 83-6358. WORTHING *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1124.

No. 83-6387. HOWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 1258.

No. 83-6391. LACOSTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 984.

No. 83-6427. THOMA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 726 F. 2d 1191.

No. 83-6447. HALL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 117 Ill. App. 3d 788, 453 N. E. 2d 1327.

No. 83-6480. JONES *v.* MABRY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 590.

No. 83-6502. LONDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 1538.

No. 83-6548. PALMER *v.* PERKO, DEPUTY DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 83-6550. PIRES *v.* GRUMMAN AEROSPACE CO. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 509.

No. 83-6556. BUCHMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 753.

No. 83-6558. GORMON *v.* FREY. C. A. 8th Cir. Certiorari denied.

No. 83-6559. SANFORD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6560. MUNOZ *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6561. ROTHSCHILD *v.* LETTS ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6562. SCHMIDT *v.* SCHMIDT. Sup. Ct. Utah. Certiorari denied.

No. 83-6564. SALCEDO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 961, 470 N. Y. S. 2d 58.

No. 83-6569. KOEHLER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 83-6571. COLEMAN *v.* SPEARS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6572. HOLLAND *v.* AGRICULTURE FEDERAL CREDIT UNION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 263, 721 F. 2d 1424.

No. 83-6576. MOLASKY *v.* WESTFALL ET AL. C. A. 8th Cir. Certiorari denied.

No. 83-6578. PALMER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83-6585. ANTONELLI *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 66.

No. 83-6586. BAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 967.

No. 83-6597. JERMOSEN *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-6598. CRUTCHFIELD *v.* FITZGERALD ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6605. NOLL *v.* KEOHANE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 768.

No. 83-6619. SMITH *v.* BRADFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1110.

No. 83-6627. ALERS *v.* PUERTO RICO ET AL. Sup. Ct. P. R. Certiorari denied.

No. 83-6632. BARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 1529.

No. 83-6655. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1526.

No. 83-6657. LANDIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 540.

No. 83-6659. KAGELER ET AL. *v.* KEOHANE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-6667. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 83-6677. HANSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1156.

No. 83-6678. HUTCHINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 83-6681. RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 2d 675.

No. 83-6684. ZULLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 940.

No. 83-6686. MORROW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 2d 233.

No. 83-6687. KELE *v.* HANBERRY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6692. RUTLEDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 82-1758. RHINEHART ET AL. *v.* THE SEATTLE TIMES ET AL. Sup. Ct. Wash. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 98 Wash. 2d 226, 654 P. 2d 673.

No. 83-802. BURLINGTON NORTHERN RAILROAD CO. ET AL. *v.* LENNEN, SECRETARY OF REVENUE OF KANSAS, ET AL. C. A.

10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 715 F. 2d 494.

No. 83-1662. LEWIS *v.* BROWN & ROOT, INC. C. A. 5th Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 722 F. 2d 209.

No. 83-1671. BRASWELL ET AL. *v.* FLINTKOTE MINES, LTD., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 723 F. 2d 527.

Rehearing Denied

No. 82-1186. TRANS WORLD AIRLINES, INC. *v.* FRANKLIN MINT CORP. ET AL., 466 U. S. 243;

No. 82-1465. FRANKLIN MINT CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC., 466 U. S. 243;

No. 83-181. BALDWIN COUNTY WELCOME CENTER *v.* BROWN, 466 U. S. 147;

No. 83-1375. AKIN ET AL. *v.* DAHL, 466 U. S. 938;

No. 83-6215. GODFREY *v.* FRANCIS, WARDEN, 466 U. S. 945;

No. 83-6283. COLEMAN *v.* SUSSEX COUNTY ET AL., 466 U. S. 941;

No. 83-6284. COLEMAN *v.* MILLSBORO TOWNSHIP, 466 U. S. 941;

No. 83-6287. HERRINGTON *v.* MET COAL & COKE CO., INC., 466 U. S. 941;

No. 83-6307. YOUNG *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 466 U. S. 942;

No. 83-6308. MCPEEK ET AL. *v.* GREEN ET AL., 466 U. S. 952; and

No. 83-6393. CHANYA *v.* UNITED STATES, 466 U. S. 943. Petitions for rehearing denied.

No. 82-708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL., 466 U. S. 198. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 83-243. BROWN & ROOT, INC., ET AL. *v.* THORNTON ET AL., 464 U. S. 1052. Motion for leave to file petition for rehearing denied.

JUNE 7, 1984

Miscellaneous Order

NO. A–974. WISCONSIN ELECTIONS BOARD ET AL. *v.* REPUBLICAN PARTY OF WISCONSIN ET AL. Application for stay of the mandate of the United States District Court for the Eastern District of Wisconsin, presented to JUSTICE STEVENS, and by him referred to the Court, is granted pending the timely docketing and final disposition of the appeal.

JUNE 11, 1984

Appeals Dismissed

NO. 83–1021. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ALLSTATE INSURANCE CO. Appeal from D. C. S. D. Miss. dismissed for want of jurisdiction. Reported below: 570 F. Supp. 1224.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

Without explanation, the Court holds today that we lack appellate jurisdiction under 28 U. S. C. § 1252 to review a judgment of a Federal District Court holding an entire Act of Congress unconstitutional as long as the party seeking review merely purports to challenge only the remedy ordered by the District Court *even though the remedy sought on appeal would necessarily require a reversal of the District Court holding that the Act is unconstitutional.*[*] The practical effect of this holding is that by merely addressing a challenge only to the remedy provided by the District Court, a direct appeal to this Court from a decision of a Federal District Court holding an Act of Congress unconstitutional can be frustrated. Notwithstanding the burdens on the Court—which have more than doubled in three decades—I am unwilling to say on the basis of the scant information before us that Congress intended our appellate jurisdiction under § 1252 to be so easily circumvented. Because of the significance of not only the jurisdictional but the underlying substantive issues presented by this appeal, I would set the case for argument, and postpone resolution of the jurisdictional question until argument on the merits.

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[*] Section 1252 provides in relevant part that

"[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof . . . is a party."

A brief recitation of the procedural history of this case is necessary to put the Court's holding in perspective. In 1963, Congress passed § 6(d) of the Fair Labor Standards Act (FLSA), 29 U. S. C. § 206(d), known as the Equal Pay Act. The Act vested enforcement authority for the Equal Pay Act in the Secretary of Labor. However, in 1978, as part of an overall effort to centralize authority for enforcement of the various sex discrimination statutes, the Secretary's enforcement authority was transferred to the Equal Employment Opportunity Commission by Reorganization Plan No. 1 of 1978, 3 CFR 321 (1979). The Reorganization Plan was implemented pursuant to the Reorganization Act of 1977, 5 U. S. C. § 901 *et seq.*, which conferred on the President authority to reorganize Executive departments and agencies subject to certain specified congressional limitations. The Reorganization Act required the President to transmit any proposed reorganization plan to both Houses of Congress. § 903. Pursuant to 5 U. S. C. § 906(a), any plan submitted by the President became "effective" at the end of 60 days of continuous session of the Congress unless during that time either House passed a resolution of disapproval or its equivalent.

Reorganization Plan No. 1 was submitted to both Houses of Congress as required by the Reorganization Act. The House roundly rejected a resolution of disapproval. H. R. Res. 1049, 95th Cong., 2d Sess. (1978); 124 Cong. Rec. 11336–11337 (1978). Although a resolution of disapproval was not brought to a vote in the Senate, the Senate Committee on Governmental Affairs unanimously recommended against passage of a resolution of disapproval. S. Res. 404, 95th Cong., 2d Sess. (1978); S. Rep. No. 95–750, pp. 6, 10 (1978). Because neither House of Congress vetoed the Reorganization Plan, the Plan and the transfer of enforcement authority to appellant, the Equal Employment Opportunity Commission, became effective.

In April 1982, appellant filed a complaint against appellee in the United States District Court for the Southern District of Mississippi, alleging that appellee was violating the Equal Pay Act by paying lower wages to female unit supervisors and underwriters than to males performing the same duties. Appellee moved for summary judgment, contending that the transfer of enforcement authority to appellant under Reorganization Plan No. 1 was invalid because the legislative veto provision in the Reorganization Act was unconstitutional. Appellee maintained that the legislative veto provision was not severable from the balance of the Act and, thus, that the entire Act was invalid; that the transfer of enforcement authority to appellant pursuant to the Act was therefore invalid; and that, as a result, appellant was without authority to enforce the Equal Pay Act.

The District Court granted appellee's summary judgment motion and dismissed appellant's enforcement action. 570 F. Supp. 1224 (1983). The court first held that the one-House veto provision in the Reorganization Act, even though not exercised here, was unconstitutional under *INS* v. *Chadha*, 462 U. S. 919 (1983). 570 F. Supp., at 1229. After a brief inquiry into the legislative history of the Reorganization Act, the court determined that "Congress intended the one-house veto provision to be an integral and inseparable part of the entire Act such that it would limit the power of the President to propose and enact reorganization plans." *Id.*, at 1232. It then concluded that since the legislative veto provision was unconstitutional, "the entire Act must be held unconstitutional," *ibid.*:

> "[T]his court must conclude that *the Reorganization Act of 1977 is unconstitutional.* It necessarily follows that the Reorganization Plan 1 of 1978, which contains the provision allowing the EEOC to enforce the Equal Pay Act, is unconstitutional since the plan was adopted pursuant to the Act." *Id.*, at 1234 (emphasis added).

Last, applying the standards set forth by this Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), the District Court decided that its decision should be given retroactive effect.

On September 16, 1983, appellant filed in the District Court a notice of appeal to this Court. One month later, appellant filed a notice of appeal to the Court of Appeals for the Fifth Circuit, invoking that court's jurisdiction under 28 U. S. C. § 1291. On November 23, 1983, appellee filed a motion in the Fifth Circuit to dismiss appellant's § 1291 appeal. Appellant filed a memorandum in opposition contending, as the Solicitor General did in *Heckler* v. *Edwards*, 465 U. S. 870 (1984), that a direct appeal to this Court does not lie where the appellant challenges only the relief provided in the district court, not that court's holding that a particular Act of Congress is unconstitutional. The Fifth Circuit denied appellant's motion to dismiss, but it stayed the appeal pending resolution of the jurisdictional issue by this Court. We in turn held the case pending disposition of *Heckler* v. *Edwards*, *supra*, in which we held that a direct appeal to this Court under § 1252 does not lie when the appellant challenges only the relief granted, not the district court's holding that an Act of Congress is unconstitutional.

The Solicitor General argues on behalf of appellant that appellant challenges only the relief ordered—dismissal of the enforcement action—not the District Court's holding that the legislative veto provision is unconstitutional. He thus contends, and the Court accepts the argument, that under *Heckler* v. *Edwards*, *supra*, the appeal should be dismissed for want of jurisdiction. I agree that appellant does not challenge the District Court's holding that the legislative veto provision is unconstitutional. But this is not the question. The controlling question is whether appellant is in fact challenging the District Court's holding that the *entire* Act—not just the legislative veto provision—is unconstitutional.

I see no alternative to the conclusion that appellant is necessarily challenging the constitutional holding. Appellant cannot possibly challenge the dismissal of the enforcement action without at the same time challenging the District Court's holding that the Act in its entirety is unconstitutional. The dismissal and the constitutional holding are inextricably linked; the Act was held unconstitutional, as a result of which appellant was held to be without enforcement authority, and therefore the complaint was dismissed. If the District Court's dismissal is to be overturned, the appellate court must overturn the holding that the Act in its entirety is unconstitutional. In the words of *Heckler* v. *Edwards*, *supra*, at 880, "the issue on appeal is the holding of statutory unconstitutionality."

The Court purports to rely upon our recent decision in *Heckler* to support its dismissal. However, it is plain that that case is quite different from this one in the most critical respect. In *Heckler*, the Government conceded that it was not challenging the *only* constitutional holding of the District Court in that case. Here, in contrast, while the Government accepts the holding that the legislative veto provision is unconstitutional, it does not concede the correctness of the District Court's holding that the entire Act is unconstitutional. This is precisely the holding it seeks to have reviewed on appeal. Given the obvious difference between this case and *Heckler*, at the very least I am unprepared to say here, without briefing and argument, that jurisdiction does not lie to this Court.

The underlying problem that the Solicitor General's argument is designed to circumvent—and the issue that the Court's unexplained dismissal fails to come to grips with—is that the District Court's invalidation of the Act in its entirety probably could have been—and perhaps should have been—on a statutory, not a constitutional basis. See *INS* v. *Chadha, supra,* at 931–932. The District Court's holding indeed amounts to nothing more than a determination of congressional intent, and it appears to acknowledge as much. 570 F. Supp., at 1230. Had the District Court simply determined, as a matter of statutory construction, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled under *Heckler* v. *Edwards*. Under these circumstances, it would be clear, as in *Heckler*, that appellant was not challenging the constitutional holding of the District Court since it concedes the validity of the court's holding on the legislative veto provision. But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and implicitly by the Court, that the holding was in reality one of statutory construction cannot change the fact that the District Court explicitly and unambiguously held the entire Act *unconstitutional*.

I find the Court's readiness to dismiss this case for want of jurisdiction disturbing particularly in light of the importance of the underlying substantive issues. An entire Act of Congress has been held unconstitutional, which itself raises a question of import. There is the question whether the District Court was correct in its finding that the legislative veto provision is nonseverable. There apparently are also lingering questions after *Chadha* on what a court is to do once it finds a legislative veto provision unconstitutional and nonseverable. Finally, there are the substantial questions whether *Chadha* should be applied retroactively, given that the Reorganization Plan was not vetoed by either House and was implemented before *Chadha* was decided, and whether Congress has in any event ratified the transfer of enforcement authority to the EEOC through appropriations and other statutes validly passed. These matters are appropriate for resolution by this Court.

No. 83-1700. BLUM ET AL. *v.* ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 99 Ill. 2d 407, 459 N. E. 2d 966.

No. 83-1711. ALBRECHT, INC., ET AL. *v.* VILLAGE OF HUDSON. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 9 Ohio St. 3d 69, 458 N. E. 2d 852.

No. 83-6591. PERSHE *v.* IRIZARRY ET AL. Appeal from Super. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 82-707. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 82-804. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *ICC* v. *American Trucking Assns., Inc., ante,* p. 354. Reported below: 682 F. 2d 1092.

Miscellaneous Orders

No. D-412. IN RE DISBARMENT OF SPITZNAGEL. Disbarment entered. [For earlier order herein, see 465 U. S. 1096.]

No. D-418. IN RE DISBARMENT OF ANDERSON. Disbarment entered. [For earlier order herein, see 466 U. S. 934.]

No. D-435. IN RE DISBARMENT OF MANN. It is ordered that William Davis Mann, of Akron, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-436. IN RE DISBARMENT OF HOWARD. It is ordered that Charles P. Howard, Jr., of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-437. In re Disbarment of Feinberg. It is ordered that Alexander Feinberg, of Haddonfield, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-438. In re Disbarment of Guardino. It is ordered that Joseph Richard Guardino, of East Williston, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-439. In re Disbarment of Gerzof. It is ordered that Julius M. Gerzof, of Freeport, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. Texas *v.* New Mexico. Motion of New Mexico to remand the case to the Special Master denied. Exception of New Mexico to the Report of the Special Master overruled. Report and Recommendation of the Special Master approved. [For earlier order herein, see, *e. g.*, 465 U. S. 1063.]

No. 82-5920. Shea *v.* Louisiana. Sup. Ct. La. [Certiorari granted, 466 U. S. 957.] Motion for appointment of counsel granted, and it is ordered that Frances Baker Jack, of Shreveport, La., be appointed to serve as counsel for petitioner in this case.

No. 83-727. Alexander, Governor of Tennessee, et al. *v.* Jennings et al. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1021.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-990. School District of the City of Grand Rapids et al. *v.* Ball et al. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1065]; and

No. 83–1325. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 466 U. S. 926.] Motion of Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* granted.

No. 83–1013. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 83–1373. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 466 U. S. 957.] Motion of the parties to dispense with printing the joint appendix granted.

No. 83–1158. ESTATE OF THORNTON ET AL. *v.* CALDOR, INC. Sup. Ct. Conn. [Certiorari granted, 465 U. S. 1078.] Motions of Anti-Defamation League of B'nai B'rith, Seventh-Day Adventist Church, and Americans United for Separation of Church and State for leave to file briefs as *amici curiae* granted.

No. 83–1307. UNITED STATES *v.* POWELL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1203.] Motion for appointment of counsel granted, and it is ordered that John J. Cleary, Esquire, of San Diego, Cal., be appointed to serve as counsel for respondent in this case.

No. 83–5424. AKE *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 465 U. S. 1099.] Motions of New Jersey Department of the Public Advocate, American Psychiatric Association, and American Psychological Association et al. for leave to file briefs as *amici curiae* granted.

No. 83–6035. TAYLOR *v.* UNITED STATES. C. A. 9th Cir.; and

No. 83–6628. LYONS *v.* U. S. AIR FORCE ET AL. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 2, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 83-6061. GARCIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 466 U. S. 926.] Motion of petitioners to dispense with printing the joint appendix granted.

Certiorari Granted

No. 82-1832. TOWN OF HALLIE ET AL. *v.* CITY OF EAU CLAIRE. C. A. 7th Cir. Certiorari granted. Reported below: 700 F. 2d 376.

No. 82-1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 702 F. 2d 532.

No. 83-1708. DEAN WITTER REYNOLDS INC. *v.* BYRD. C. A. 9th Cir. Certiorari granted. Reported below: 726 F. 2d 552.

No. 83-1249. SIMS ET AL. *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. D. C. Cir. Certiorari granted, case consolidated with No. 83-1075, *CIA* v. *Sims* [certiorari granted, 465 U. S. 1078], and a total of one hour allotted for oral argument. Reported below: 228 U. S. App. D. C. 269, 709 F. 2d 95.

Certiorari Denied. (See also No. 83-6591, *supra.*)

No. 82-1827. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 1337.

No. 83-154. TITLE INSURANCE RATING BUREAU OF ARIZONA, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 1247.

No. 83-1351. ALONSO *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1109.

No. 83-1430. J. BARANELLO & SONS *v.* CITY OF PATERSON ET AL.;

No. 83-1683. CONSOLIDATED PRECAST, INC. *v.* CITY OF PATERSON ET AL.; and

No. 83-1725. INDEPENDENT ELECTRICAL CO., INC. *v.* CITY OF PATERSON ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-1463. Ledesma *v.* Georgia; and

No. 83-1578. Merritt *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 251 Ga. 885, 311 S. E. 2d 427.

No. 83-1520. Local 222, International Ladies' Garment Workers' Union, AFL-CIO *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 195, 721 F. 2d 1355.

No. 83-1539. Carroll *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 155.

No. 83-1577. DeFiore *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 720 F. 2d 757.

No. 83-1599. Holder *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 366, 456 N. E. 2d 628.

No. 83-1652. Papago Tribal Utility Authority *v.* Federal Energy Regulatory Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 424, 723 F. 2d 950.

No. 83-1663. Schafer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 155.

No. 83-1668. Moskowitz et al. *v.* Saul J. Morgan Enterprises, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83-1670. American Motors Corp. *v.* Hanna. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1300.

No. 83-1680. Lawless *v.* Pierce et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 747, 455 N. E. 2d 113.

No. 83-1681. Caron *v.* Bangor Publishing Co. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 470 A. 2d 782.

No. 83-1684. Bryner et al. *v.* Security Pacific National Bank et al. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 746.

No. 83–1689. BROWN, ADMINISTRATRIX OF THE ESTATE OF BROWN, ET AL. *v.* BROWN ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 226 Va. 320, 309 S. E. 2d 586.

No. 83–1690. GUSTAFSON *v.* BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 242.

No. 83–1698. D. E. ROGERS ASSOCIATES, INC., ET AL. *v.* GARDNER-DENVER CO. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1431.

No. 83–1705. PEKARSKI ET AL. *v.* ABRAHAM. C. A. 3d Cir. Certiorari denied. Reported below: 728 F. 2d 167.

No. 83–1707. ROTHMANN ET AL. *v.* M.V. RESOLUTE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 1097.

No. 83–1709. STEIN *v.* GAGLIARDO. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1111.

No. 83–1717. ALABAMA SURFACE MINING RECLAMATION COMMISSION *v.* COMMERCIAL STANDARD INSURANCE CO. Ct. Crim. App. Ala. Certiorari denied. Reported below: 443 So. 2d 1245.

No. 83–1720. KORN ET AL. *v.* RABBINICAL COUNCIL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83–1724. GRIFFIS *v.* DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 822.

No. 83–1730. SEA-HIRE SERVICE, S. A. *v.* TRINIDAD CORP. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83–1742. SCOTT ET AL. *v.* SIEBEL, EXECUTRIX OF THE ESTATE OF SIEBEL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 995.

No. 83–1769. BURCHE *v.* WALTERS ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 355 N. W. 2d 64.

No. 83–1773. EILERSON ET AL. *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 83–1787. ROBINSON ET VIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83–1795. TODD PACIFIC SHIPYARDS ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 747.

No. 83–1802. DANIEL ET AL. *v.* PETTWAY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 315.

No. 83–1808. NINETY-TWO POINT SEVEN BROADCASTING, INC., ET AL. *v.* HANOVER RADIO, INC. Sup. Ct. Va. Certiorari denied.

No. 83–1810. MILLER *v.* PORT OF ILWACO ET AL. Ct. App. Wash. Certiorari denied. Reported below: 35 Wash. App. 1070.

No. 83–1821. LEVENSON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 576.

No. 83–1828. SPERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 69.

No. 83–1857. KAISER ALUMINUM & CHEMICAL CORP. *v.* PARSON. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 473.

No. 83–1861. ALLEGHENY MUTUAL CASUALTY CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 975.

No. 83–1866. ERKINS ET AL. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 837.

No. 83–5286. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1553.

No. 83–6237. WALKER *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83–6263. HOOD *v.* UNITED STATES PAROLE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 738.

No. 83–6270. HAYES *v.* MIGNANO. C. A. 11th Cir. Certiorari denied.

No. 83-6353. BURY *v.* MACALUSO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 977.

No. 83-6384. CHERRY *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL CENTER. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1296.

No. 83-6409. RAMOS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-6424. ATALIG *v.* NORTHERN MARIANA ISLANDS. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 682.

No. 83-6438. FANT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 502 Pa. 268, 465 A. 2d 1245.

No. 83-6463. RIZZIO *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 117 Ill. App. 3d 1162, 466 N. E. 2d 417.

No. 83-6476. GIRDLER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 138 Ariz. 482, 675 P. 2d 1301.

No. 83-6594. VICCARONE *v.* NORTH OLMSTEAD POLICE DEPARTMENT. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 912.

No. 83-6603. SENA *v.* WINANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 83-6609. GEE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 298 Md. 565, 471 A. 2d 712.

No. 83-6612. DAWSON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 83-6614. TILLIS *v.* COOKE ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6615. HERNANDEZ *v.* SPENCER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 128.

No. 83-6618. SMITH *v.* CARROLL. Super. Ct. Pa. Certiorari denied. Reported below: 316 Pa. Super. 634, 465 A. 2d 702.

No. 83-6621. REMSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83-6630. LIPSCOMB *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 911.

No. 83-6643. REILLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83-6664. BERRY *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 726 F. 2d 1142.

No. 83-6669. BARTELS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-6682. PARKER *v.* PETROVSKY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 83-6691. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1450.

No. 83-6700. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6701. LAROCHE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 1541.

No. 83-6703. HILDEBRAND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83-6705. BURRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6710. STINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 156.

No. 83-6711. MCKINESS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 159.

No. 83-6719. BLAKE *v.* GOLDMAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 601, 459 N. E. 2d 1291.

No. 83-6720. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 83-6721. CARLUCCI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 753.

No. 83-6725. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 726 F. 2d 661.

No. 83-6726. PALMER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-6729. BROWNING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 83-6730. HINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 421.

No. 83-6731. JOURDAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1111.

No. 83-6734. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1112.

No. 83-1309. DOE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 722 F. 2d 303.

No. 83-1468. DURANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 723 F. 2d 447.

No. 83-6589. ROBISON *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 83-6736. SIMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-6589, 677 P. 2d 1080; No. 83-6736, 444 So. 2d 922.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83-998. FOLEY CONSTRUCTION CO. *v.* U. S. ARMY CORPS OF ENGINEERS ET AL., 466 U. S. 936;

No. 83-1465. FARMER *v.* BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, 466 U. S. 946;

No. 83-5995. WILLIAMS *v.* TEXAS, 466 U. S. 954;

No. 83-6297. UNDERWOOD *v.* OHIO, 466 U. S. 934;

No. 83-6397. HYMAN *v.* SOUTH CAROLINA, 466 U. S. 963; and

No. 83-6416. BROADWAY *v.* UNITED STATES, 466 U. S. 943. Petitions for rehearing denied.

No. 83-6485. ACHARYA *v.* YOUNG ET AL., 466 U. S. 961; and No. 83-6498. FLICK *v.* UNITED STATES, 466 U. S. 962. Petitions for rehearing denied.

JUNE 13, 1984

Dismissal Under Rule 53

No. 82-1074. AMERICAN CAST IRON PIPE CO. *v.* PETTWAY ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 681 F. 2d 1259.

JUNE 18, 1984

Dismissal Under Rule 53

No. 83-930. ALYESKA PIPELINE SERVICE CO. *v.* THE VESSEL BAY RIDGE ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 703 F. 2d 381.

Appeals Dismissed

No. 83-1096. GOMEZ-HERMANOS, INC. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST would postpone further consideration of the question of jurisdiction until a hearing of the case on the merits. Reported below: —— P. R. R. ——.

No. 83-1196. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* NEW YORK STATE TAX COMMISSION ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 60 N. Y. 2d 745, 457 N. E. 2d 769.

No. 83-1764. L. D. BUTLER, INC. *v.* ASHLEY, DBA PHIL ASHLEY TRUCKING. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 83-1540. LESTER ET AL. *v.* MCGILL. Appeal from Ct. App. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 105 Idaho 692, 672 P. 2d 570.

No. 83-6339. HANSON *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 113 Ill. App. 3d 1174, 457 N. E. 2d 175.

Miscellaneous Orders

No. — — —. AMIDON ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. — — —. CHEVRON U. S. A., INC. *v.* HAMMOND ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–971 (83–6828). PEPPER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. 82–976. CALIFORNIA *v.* HOWARD, 466 U. S. 957. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 83–240. LAWRENCE COUNTY ET AL. *v.* LEAD-DEADWOOD SCHOOL DISTRICT NO. 40–1. Sup. Ct. S. D. [Probable jurisdiction noted, 466 U. S. 903.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–727. ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. *v.* JENNINGS ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1021.] Motion of respondents to substitute Hershel Choate for Rosier Jennings, now deceased, is granted.

No. 83–1394. UNITED STATES ET AL. *v.* LOCKE ET AL. D. C. Nev. [Probable jurisdiction noted, *ante*, p. 1225.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–1429. ALABAMA POWER CO. ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Motions of Procter & Gamble Paper Products Co., Arizona Electric Power Cooperative, Inc., et al., Associated Industries of Alabama, Inc., National Coal Association, and Ohio Mining and Reclamation Association for leave to file briefs as *amici curiae* granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 83-1620. FIRST NATIONAL BANK OF ATLANTA, AS SUCCESSOR IN INTEREST TO FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA *v.* BARTOW COUNTY BOARD OF TAX ASSESSORS ET AL. Sup. Ct. Ga. [Probable jurisdiction noted, *ante*, p. 1214.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-1747 (A-935). TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE *v.* ROSE. C. A. 6th Cir. Motion to vacate the stay entered by JUSTICE O'CONNOR [466 U. S. 1301] denied.

No. 83-1840. BERTHELOT *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner to compel the transmission of presentence report denied.

No. 83-1959. EKLUND *v.* UNITED STATES; and MARTIN *v.* UNITED STATES. C. A. 8th Cir.; and

No. 83-1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. Motions of petitioners to expedite consideration of the petitions for writs of certiorari denied.

No. 83-5424. AKE *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 465 U. S. 1099.] Motions of Office of the Public Defender of Oklahoma County, Oklahoma, et al. and National Legal Aid and Defender Association et al. for leave to file briefs as *amici curiae* granted.

No. 83-6634. DAWN ET AL. *v.* H. REX GREENE, M. D., INC., ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Motion of appellants for leave to proceed *in forma pauperis* denied. Appellants are allowed until July 9, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal for want of jurisdiction and, treating the papers whereon the appeal would be taken as a petition for writ of certiorari, we would deny certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–6676. GARCIA *v.* INGRAM. C. A. 10th Cir. Motion of petitioner to consolidate this case with No. 83–1360, *Webb* v. *County Board of Education of Dyer County, Tennessee* [certiorari granted, 466 U. S. 935], denied.

No. 83–6631. IN RE DOHM; and

No. 83–6652. IN RE YATES. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 83–1015. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* HAMPTON COUNTY ELECTION COMMISSION ET AL. Appeal from D. C. S. C. Probable jurisdiction noted. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Certiorari Granted

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 698 F. 2d 802.

No. 83–529. UNITED STATES *v.* SHARPE ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 712 F. 2d 65.

No. 83–1623. ANDERSON *v.* CITY OF BESSEMER CITY, NORTH CAROLINA. C. A. 4th Cir. Certiorari granted. Reported below: 717 F. 2d 149.

No. 83–1625. UNITED STATES *v.* JOHNS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 707 F. 2d 1093.

No. 83–1660. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* PARKER ET AL.; and

No. 83–6381. PARKER ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 1st Cir. Motions of Gill Parker et al. for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 722 F. 2d 933.

No. 83-1878. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CHANEY ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 231 U. S. App. D. C. 136, 718 F. 2d 1174; and 233 U. S. App. D. C. 146, 724 F. 2d 1030.

No. 83-5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 718 F. 2d 391.

Certiorari Denied. (See also Nos. 83-1096, 83-1540, and 83-6339, *supra.*)

No. 82-1699. OAKLAND SCAVENGER CO. *v.* BONILLA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 697 F. 2d 1297.

No. 83-1398. CROCKETT, MEMBER, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 128, 720 F. 2d 1355.

No. 83-1450. CUNNINGHAM ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 2d 1455.

No. 83-1477. NEZOWY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 1120.

No. 83-1485. MOLLER ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 721 F. 2d 810.

No. 83-1496. SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 740.

No. 83-1503. COCKRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 1423.

No. 83-1510. FERGUSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 915.

No. 83-1527. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 826.

No. 83–1528. LANE *v.* ARKANSAS VALLEY PUBLISHING CO. ET AL. Ct. App. Colo. Certiorari denied. Reported below: 675 P. 2d 747.

No. 83–1573. CALANDRA *v.* UNITED STATES;
No. 83–1657. LICAVOLI *v.* UNITED STATES; and
No. 83–1801. LIBERATORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 1040.

No. 83–1596. VALENTA *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 721 F. 2d 126.

No. 83–1614. GOTTFRIED ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 1017.

No. 83–1636. PROUD, INDIVIDUALLY, AND AS NEXT FRIEND OF PROUD, A MINOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 705.

No. 83–1719. CUSMANO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 380.

No. 83–1728. HOME BOX OFFICE, INC., ET AL. *v.* CRIMPERS PROMOTIONS INC. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 2d 290.

No. 83–1734. BALELO ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 753.

No. 83–1735. OREGON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 1394.

No. 83–1740. SENN TRUCKING CO. *v.* WASSON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 280 S. C. 279, 312 S. E. 2d 252.

No. 83–1749. HEINRICH SCHMIDT REEDEREI *v.* BYRD, AS ADMINISTRATRIX OF THE ESTATE OF BYRD. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 114.

No. 83–1765. BRAY ET AL. *v.* MICHIGAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 149, 341 N. W. 2d 92.

No. 83–1774. Raymark Industries, Inc. *v.* Clay et al. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1289.

No. 83–1784. Port Houston Marine, Inc. *v.* Dockside Terminal Services, Inc. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 658 S. W. 2d 191.

No. 83–1786. Aarsvold et al. *v.* Greyhound Lines, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 724 F. 2d 72.

No. 83–1794. Regan *v.* Town of Brookhaven. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 83–1804. Sandusky Real Estate, Inc., dba Real Estate One, et al. *v.* McDonald et ux. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–1825. Cord *v.* Neuhoff et al., Co-Executors of the Estate of Cord. Sup. Ct. Nev. Certiorari denied.

No. 83–1837. Watkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 904.

No. 83–1859. Fothergill *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 691.

No. 83–1881. M & K Farms, Inc. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 767.

No. 83–1883. Doamarel *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1449.

No. 83–5846. Lee *v.* United States. Ct. App. D. C. Certiorari denied.

No. 83–6277. Handy *v.* Peck. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1090.

No. 83–6352. Goldade *v.* Wyoming. Sup. Ct. Wyo. Certiorari denied. Reported below: 674 P. 2d 721.

No. 83–6457. Lee *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 128.

No. 83–6466. Wolf *v.* Gardner, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 772.

No. 83-6469. HASTINGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83-6475. CASTELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 813.

No. 83-6516. SCOBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83-6617. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 455 and 719 F. 2d 1480.

No. 83-6626. COLLINS *v.* WESTERN ELECTRIC CO., INC. C. A. 7th Cir. Certiorari denied.

No. 83-6638. KOENIG *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-6641. WELLS *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1112.

No. 83-6642. SANDERS *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 557.

No. 83-6645. PHILLIPS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 446 So. 2d 57.

No. 83-6648. RICHARDSON *v.* SHERIFF OF JOHNSTON COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 902.

No. 83-6649. SLATER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1110.

No. 83-6651. NAFF *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6658. FARLEY *v.* SAUNDERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 83-6724. WABBINGTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 446 So. 2d 665.

No. 83-6728. ALLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6735. PABLO-LUGONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 624.

No. 83-6737. THREAT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 1360.

No. 83-6739. PONCE DE LEON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 1453.

No. 83-6743. COOPER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 670.

No. 83-6744. RUSSELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6745. MCKINNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-6747. ODOM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-6750. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6754. RUSK *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1454.

No. 83-6762. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 83-6764. GARCIA-ARRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-778. WAMBHEIM ET AL. *v.* J. C. PENNEY CO., INC. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 705 F. 2d 1492.

No. 83-1498. BLACK CITIZENS FOR A FAIR MEDIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 231 U. S. App. D. C. 163, 719 F. 2d 407.

No. 83-1509. MURPHY OIL CORP. *v.* NAPH-SOL REFINING CO.; and

No. 83-1515. MOBIL OIL CORP. ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 728 F. 2d 1477.

No. 83-1555. HOOPA VALLEY TRIBE OF INDIANS *v.* SHORT ET AL.; and

No. 83-1638. EDDY ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Motion of Cherokee Nation of Oklahoma et al. for leave to file a brief as *amici curiae* in No. 83-1555 granted. Certiorari denied. Reported below: 719 F. 2d 1133.

No. 83-1558. ZANT, WARDEN *v.* WILLIS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 720 F. 2d 1212.

No. 83-1615. O'ROURKE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83-6425. WAYMENT *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 10th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 719 F. 2d 327.

No. 83-1752. HUMPHREY, ATTORNEY GENERAL OF MINNESOTA, ET AL. *v.* NORTHERN STATES POWER CO. ET AL. Sup. Ct. Minn. Motion of National Association of State Utility Consumer Advocates for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 344 N. W. 2d 374.

No. 83-6260. TRAVAGLIA *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 83-6266. LESKO *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 83-6452. TOKMAN *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 83-6500. DUTTON *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 83-6608. WILLIS *v.* ZANT, WARDEN. C. A. 11th Cir.; and
No. 83-6636. GUZMAN *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: Nos. 83-6260 and 83-6266, 502 Pa. 474, 467 A. 2d 288; No. 83-6452, 435 So. 2d 664; No. 83-6500, 674 P. 2d 1134; No. 83-6608, 720 F. 2d 1212; No. 83-6636, 100 N. M. 756, 676 P. 2d 1321.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–122. HYDROKINETICS, INC. *v.* ALASKA MECHANICAL, INC., 466 U. S. 962;

No. 83–1159. KUNTZ *v.* WINTERS NATIONAL BANK & TRUST CO. ET AL., 465 U. S. 1080;

No. 83–6145. PALAZZO *v.* GULF OIL CORP., 465 U. S. 1070;

No. 83–6227. PERKINS *v.* THOMPSON, GOVERNOR OF ILLINOIS, 466 U. S. 960;

No. 83–6494. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL., *ante*, p. 1201;

No. 83–6513. MCDONALD *v.* LEECH, ATTORNEY GENERAL OF TENNESSEE, ET AL., *ante*, p. 1208; and

No. 83–6530. BONNER *v.* PHILADELPHIA INTERNATIONAL RECORDS ET AL., 466 U. S. 977. Petitions for rehearing denied.

JUNE 19, 1984

Miscellaneous Order

No. A–1030. SHRINER *v.* WAINWRIGHT, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is denied for the reasons stated in the opinion of the Court of Appeals for the Eleventh Circuit, 735 F. 2d 1236 (1984). JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

JUNE 25, 1984

Certiorari Granted—Vacated and Remanded

No. 83–507. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA *v.* SHELTER FRAMING CORP. ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co., ante*, p. 717. Reported below: 705 F. 2d 1502.

Miscellaneous Orders

No. A–1019. HOLDERMAN *v.* UNITED STATES. D. C. Conn. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–409. IN RE DISBARMENT OF MAIER. Disbarment entered. [For earlier order herein, see 465 U. S. 1096.]

No. D–410. IN RE DISBARMENT OF PACOR. Disbarment entered. [For earlier order herein, see 465 U. S. 1096.]

No. D–417. IN RE DISBARMENT OF FRIEDLAND. Disbarment entered. [For earlier order herein, see 466 U. S. 921.]

No. 83–240. LAWRENCE COUNTY ET AL. *v.* LEAD-DEADWOOD SCHOOL DISTRICT NO. 40–1. Sup. Ct. S. D. [Probable jurisdiction noted, 466 U. S. 903.] Motion of National Association of Counties et al. for leave to file a brief as *amici curiae* granted.

No. 83–728. HERB'S WELDING, INC., ET AL. *v.* GRAY ET AL. C. A. 5th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of the Solicitor General for divided argument granted.

No. 83–1158. ESTATE OF THORNTON ET AL. *v.* CALDOR, INC. Sup. Ct. Conn. [Certiorari granted, 465 U. S. 1078.] Motion of Connecticut for divided argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 83–1234. ASHLAND OIL, INC., ET AL. *v.* GOOD ET AL.;

No. 83–1248. MOBIL OIL CORP. ET AL. *v.* BATCHELDER ET AL.; and

No. 83–1278. CITIES SERVICE OIL CO. ET AL. *v.* MATZEN ET AL. Sup. Ct. Kan. Motions of the parties to defer consideration of the petitions for writs of certiorari granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 83–1427. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WITT. C. A. 11th Cir. [Certiorari granted, 466 U. S. 957.] Motion of Texas District and County Attorneys Association for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 83–1452. MARRESE ET AL. *v.* AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS. C. A. 7th Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. JUS-

TICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 726 F. 2d 1150.

Certiorari Denied

No. 82–1649. MARROQUIN-MANRIGUEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 699 F. 2d 129.

No. 83–541. REPUBLIC INDUSTRIES, INC. *v.* TEAMSTERS JOINT COUNCIL NO. 83 OF VIRGINIA PENSION FUND. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 628.

No. 83–702. G & R ROOFING CO. *v.* CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 1502.

No. 83–1221. DUNAGIN ET AL. *v.* CITY OF OXFORD, MISSISSIPPI, ET AL.; and

No. 83–1244. LAMAR OUTDOOR ADVERTISING, INC., ET AL. *v.* MISSISSIPPI STATE TAX COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 738.

No. 83–1246. PEICK ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1247.

No. 83–1646. SIBLEY, LINDSAY & CURR CO., A DIVISION OF ASSOCIATED DRY GOODS CORP. *v.* BAKERY, CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 2d 843.

No. 83–6410. PATTERSON *v.* HEFFRON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1110.

No. 83–6467. MINER ET AL. *v.* BRACKNEY. C. A. 8th Cir. Certiorari denied. Reported below: 719 F. 2d 954.

No. 83–665. BUFFALO TEACHERS FEDERATION ET AL. *v.* ARTHUR ET AL. C. A. 2d Cir. Motion of American Federation of Teachers, AFL–CIO, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 712 F. 2d 816.

No. 83–5933. Garcia *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 97 Ill. 2d 58, 454 N. E. 2d 274.

Justice Marshall, with whom Justice Brennan joins, dissenting.

Petitioner was charged with committing a variety of crimes with an accomplice, including four murders. He was convicted, sentenced to death, and his conviction and sentence were affirmed by the Supreme Court of Illinois. 97 Ill. 2d 58, 454 N. E. 2d. 274 (1983).

According to the Supreme Court of Illinois, the jurors were instructed that they could return guilty verdicts on the charges against petitioner "if they found that [he] had actually commited the crimes, or, alternatively, if they found that he was legally responsible for the conduct of the perpetrator under the Illinois accountability statute." *Id.*, at 83, 454 N. E. 2d, at 284.* The Illinois Supreme Court concluded that the general verdict returned by the jury failed "to reveal whether the jury found him guilty of actually killing anyone or whether he was convicted on the basis of accountability." *Id.*, at 84, 454 N. E. 2d, at 284. The Illinois Supreme Court held, however, that "[e]ven if we were to assume that [petitioner's] murder convictions rested in part or completely on a theory of accountability, the imposition of the death sentence under the circumstances present here was permissible." *Ibid.* The death sentence would be permissible because, in the eyes of the Illinois Supreme Court, "the uncontroverted evidence presented at trial concerning [petitioner's] conduct . . . clearly demonstrates that [petitioner] intended that lethal force would be employed." *Id.*, at 85, 454 N. E. 2d, at 285.

The Illinois Supreme Court was compelled to make this finding in order to preserve the State's imposition of the death penalty upon petitioner. The compulsion derived from this Court's decision in *Enmund* v. *Florida*, 458 U. S. 782 (1982). In *Enmund* this Court recognized "[s]ociety's rejection of the death penalty for accomplice liability in felony murders," *id.*, at 794, by holding that the Eighth Amendment as incorporated by the Fourteenth Amendment prohibits States from imposing the death penalty in the absence of a finding that a participant in a felony murder either killed, or attempted to kill, or intended that a killing take place or that lethal force be employed. *Id.*, at 797. Here, the jury made no explicit finding that petitioner engaged in the conduct or possessed the intent which, under *Enmund*, is required for a valid death sentence. Rather, the Illinois Supreme Court supplied this finding.

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*See Ill. Rev. Stat., ch. 38, ¶¶5–1 through 5–3 (1983).

The action taken by the Illinois Supreme Court contradicts this Court's insistence, articulated in *Enmund*, that capital punishment be tailored to a defendant's own personal responsibility and moral guilt. That tailoring was forsaken here when the jury returned a general verdict that failed to reveal whether petitioner had been convicted for murders he had actually committed himself or whether he had been convicted solely on the basis of his vicarious responsibility for the crimes of his accomplice. The "remedy" the Illinois Supreme Court created to address the ambiguity of the jury's verdict—setting itself up as a finder of fact on the issue of intent—contravenes a related tenet of this Court's death penalty jurisprudence: that the uniquely harsh consequence entailed by capital punishment demands the greatest possible exactitude in the factfinding process. See, *e. g.*, *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). The ruling of the Illinois Supreme Court mocks this standard by attempting to derive from a cold paper record a subtle factual determination best left in the hands of juries or trial courts that have had the opportunity to view witness demeanor and other delicate nuances that cannot be captured by written transcipts. Confronted with "a level of uncertainty [in] the factfinding process that cannot be tolerated in a capital case," *Beck* v. *Alabama*, *supra*, at 643, this Court should either vacate petitioner's sentence and remand with instructions that he be resentenced in a fashion that excludes the imposition of capital punishment or grant certiorari and give plenary consideration to petitioner's claim. I therefore respectfully dissent.

No. 83-6211. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 658 S. W. 2d 180.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

A grand jury in Harris County, Tex., indicted petitioner for the sexual assault of a white woman. Petitioner, a Negro with no previous criminal record, denied the charge and maintained that he was at home at the time of the crime. There were no witnesses to the assault, and no physical evidence linking petitioner to the offense. From the nature of the State's case, it was clear that petitioner's fate would turn on whether the jury accepted the identification of the white victim or believed the sworn denial of a Negro defendant. After an extensive *voir dire* and for-cause challenges, eight Negroes were left in the jury panel. The prosecution then used eight peremptory challenges to remove these Negroes. With its two remaining peremptories, the prosecution removed the two members of the venire with Hispanic surnames. Over defense counsel's objection, an all-white jury proceeded to convict petitioner of the offense charged. Petitioner was sentenced to 12 years in the Texas Department of Corrections.

This petition presents what I consider to be a prima facie violation of the Sixth and Fourteenth Amendments. Petitioner's defense rested entirely on the jury's assessment of the credibility of two witnesess, one Negro and one white. Under these circumstances, when the prosecution challenges every Negro member of the venire, the inescapable implication is that the prosecutor proceeded on the assumption that Negro jurors would be more likely than white jurors to believe a Negro defendant's version of the facts. In *Taylor* v. *Louisiana*, 419 U. S. 522, 528 (1975), the Court held that criminal defendants are entitled to a jury drawn from a "representative cross section of the community." When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right guaranteed in *Taylor* is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place.

Over the past year, I have repeatedly urged my colleagues to grant certiorari in similar cases in which state prosecutors have blatantly employed peremptory challenges to remove Negro jurors. See *Williams* v. *Illinois*, 466 U. S. 981 (1984) (MARSHALL, J., dissenting); *Gilliard* v. *Mississippi*, 464 U. S. 867 (1983) (MARSHALL, J., dissenting); *McCray* v. *New York*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting). The Court, however, remains satisfied that *Swain* v. *Alabama*, 380 U. S. 202 (1965), adequately protects criminal defendants against prosecutorial misuse of peremptory challenges. As the facts of this case reveal, the Court's reliance on *Swain* is grossly misplaced. If *Swain* protects anyone, it is the prosecution.

Under *Swain* it is presumed that prosecutors use peremptory challenges to obtain a fair and impartial jury. *Id.*, at 222. That a prosecutor excludes all Negro jurors in a particular case does not rebut this presumption. To establish a *Swain* violation, a criminal defendant must demonstrate that the State has systematically excluded Negro jurors in case after case over an extended period of time. *Id.*, at 223–224. In this case, petitioner's attorney gamely attempted to satisfy *Swain*'s burden of proof. Defense counsel set out to show that prosecutors in Harris County routinely employ peremptory challenges to exclude Negro jurors in cases involving the credibility of a white complainant and a Negro defendant. At a hearing held before the trial court, Judge Joseph Guarino, a Texas District Judge with 28 years of experience in the county's criminal justice system, testified on behalf of petitioner. Judge Guarino stated he could not recall a single instance in which a Negro juror sat on a petit jury in a criminal case in which the complainant was white and the defendant Negro. Judge Miron Love, another judge from the county, agreed that in "most of those cases" the prosecution "'would eliminate most of the black jurors' through the exercise of peremptory challenges." The testimony of Judge Guarino and Judge Love was corroborated by a variety of informed witnesses. Craig Washington, a defense attorney in the county, testified that in the past decade he had participated in roughly 140 criminal cases in which the complaining witness was white and the defendant Negro. In only two of these cases did Negroes ultimately sit on the jury, and in these cases it was only because the prosecution ran out of peremptory challenges. Jacquelyn Miles, a court reporter in Harris County, stated that over the last four years she had transcribed testimony in 20 to 25 criminal cases with white complaining witnesses and Negro defendants, and she could not recollect a single case in which a prospective Negro juror had been empaneled. Other witnesses for petitioner, including lawyers who had served under the county's District Attorney, confirmed that in this class of cases, the exclusion of Negro jurors was "the general rule."

In the face of this well-marshaled evidence, the county brazenly denied that it had a policy of excluding Negro jurors. A supervising attorney for the County District Attorney claimed that he had never advised prosecutors to exclude Negro jurors. In support of the county's claim, several Assistant District Attorneys testified under oath as to trials in which Negroes had served on the jury even though the case involved Negro defendants and white complainants. A judge testifying on behalf of the county recalled numerous occasions on which Negroes had served on juries. The thrust of the county's rebuttal was that petitioner's witnesses were familiar with only a sampling of the county's criminal docket whereas the county's witnesses were exposed to the District Attorney's entire docket. Apparently, the trial judge found this line of argument convincing because he ruled that petitioner had failed to establish a constitutional violation under *Swain* v. *Alabama*.

The lesson to be drawn from petitioner's case is that *Swain* is an insurmountable hurdle for criminal defendants. The prosecution will always be able to claim that it has greater familiarity with prosecutorial practices than defense counsel, and the prosecution will always deny that it has a policy of excluding Negro jurors. In even the most discriminatory jurisdictions, there will always be cases in which Negro jurors have at one time or another served on jury panels. If, therefore, an official denial of prosecutorial misuse buttressed by vague recollections of a few Negro jurors who have actually been empaneled is enough to rebut evidence of the quality presented by petitioner in this case, then as a practical matter it is impossible to satisfy the *Swain* standard. Cf. *United States* v. *Childress*, 715 F. 2d 1313, 1316 (CA8 1983) (en banc) (finding only two reported cases in which defendants had prevailed under *Swain* since 1965), cert. denied, 464 U. S. 1063 (1984).

In the 19 years since *Swain* was handed down, prosecutorial abuse of peremptory challenges has grown to epidemic proportions in certain regions of the country. See also *Williams* v. *Illinois*, *supra*. I respectfully dissent.

No. 83–6213. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 83–6419. DELAP *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–6213, 441 So. 2d 520; No. 83–6419, 440 So. 2d 1242.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–6454. SANSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

JUSTICE WHITE, dissenting.

In *Ohio* v. *Roberts*, 448 U. S. 56 (1980), the Court held that the introduction of hearsay statements against a criminal defendant will not violate the Confrontation Clause if two requirements are satisfied. First, the prosecution must ordinarily demonstrate the unavailability of the declarant; second, the statements must bear sufficient "indicia of reliability." *Id.*, at 65–66. The Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*, at 66. The question presented in this case is whether statements that satisfy Federal Rule of Evidence 801(d)(2)(E), which provides for the admissibility of statements of co-conspirators, necessarily satisfy the requirements of the Confrontation Clause.

The Circuits are divided on the question whether co-conspirator statements fall within the "firmly rooted hearsay exception" language of *Roberts* or whether, instead, a case-by-case inquiry into reliability is required. In this case, the Court of Appeals for the Seventh Circuit in an unpublished order held that Rule 801(d)(2)(E) provides adequate assurances of reliability. Likewise, the First, Fourth, and Fifth Circuits have also held that the Rule 801(d)(2)(E) requirements are identical to the requirements of the Confrontation Clause. See *Ottomano* v. *United States*, 468 F. 2d 269, 273 (CA1 1972), cert. denied, 409 U. S. 1128 (1973); *United States* v. *Lurz*, 666 F. 2d 69, 80–81 (CA4 1981), cert. denied, 455 U. S. 1005 (1982); *United States* v. *Peacock*, 654 F. 2d 339, 349–350 (CA5 1981), cert. denied, 464 U. S. 965 (1983). On the other hand, the Second, Third, Eighth, and Ninth Circuits have held that the requirements are not identical and that courts must assess the circumstances of each case to determine whether the statements carry with them sufficient indicia of reliability. See *United States* v. *Wright*, 588 F. 2d 31, 37–38 (CA2 1978), cert. denied, 440 U. S. 917 (1979); *United States* v. *Ammar*, 714 F. 2d 238, 254–257 (CA3), cert. denied *sub nom. Stillman* v. *United States*, 464 U. S. 936 (1983); *United States* v. *Kelley*, 526 F. 2d 615, 620–621 (CA8 1975), cert. denied, 424 U. S. 971 (1976); *United States* v. *Perez*, 658 F. 2d 654, 660, and n. 5 (CA9 1981).

Because of the substantial confusion surrounding this frequently recurring issue, I would grant certiorari to resolve the conflict.

No. 83–6567. ARNOLD *v.* SOUTH CAROLINA; and

No. 83–6575. PLATH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 1, 313 S. E. 2d 619.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners were convicted of murder and sentenced to death. On appeal, the convictions were affirmed but the sentences were reversed due to an improper argument the prosecution made to the jury at the sentencing hearing. 277 S. C. 126, 284 S. E. 2d 221 (1981). On remand, petitioners were again sentenced to death. They challenge that sentence on the ground that the trial court erred by allowing the jury to view the site of the murder without the presence of either the defense or the prosecution attorneys and also by making no arrangements to record what transpired at the jury-viewing. Petitioners claim that the trial court's action denied them their right under the Sixth and Fourteenth Amendments to effective assistance of counsel. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

In rejecting petitioners' claim, the Supreme Court of South Carolina principally relied upon *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934).* In *Snyder* this Court held that the Due Process Clause of the Fourteenth Amendment was not violated by excluding a defendant from an on-site inspection by a jury. *Snyder*, however, is inapposite to the case at bar. First, *Snyder* involved whether a *defendant* had the right to be present at an on-site inspection by a jury. Here, the issue is whether a defendant had the right to have his *attorney* present at such a viewing. Second, and more importantly, in *Snyder* the defendant's attorney was present and participated, along with the prosecutor, in directing the jury's attention to various aspects of the location under inspection by the jury. *Id.*, at 103–104. Here, all attorneys were excluded. Third, in *Snyder*, "everything that was said or done was taken by the stenographer and made part of the record of the trial." *Id.*, at 123–124 (Roberts, J., dissenting). Here, no record

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*The State claims that petitioners' attorneys failed properly to object at trial to their exclusion from the jury inspection. Although petitioners' attorneys do appear to have adequately objected, the South Carolina Supreme Court's ruling on the merits of the federal constitutional issue posed by petitioners removes any procedural bar that might have existed even if counsel had failed to object. See, *e. g.*, *Beecher* v. *Alabama*, 389 U. S. 35, 37, n. 3 (1967) (ruling by state court on merits of federal constitutional issue preserves issue for federal appellate review); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98 (1938).

was made of what transpired at the inspection. The importance of a record is clearly indicated in that portion of the *Snyder* opinion in which the Court criticized the trial judge for having made an improper comment to the jury during the inspection. *Id.*, at 118. Although this Court excused the trial judge's impropriety as harmless, the pertinent point is that the Court was at least able in *Snyder* to detect the trial judge's error and measure its severity. By contrast, in this case the trial court's failure to preserve a record has effectively nullified any sort of informed appellate review of the jury inspection.

It is doubtful, then, whether the trial court's actions in this case would even have satisfied the standards prevailing at the time of *Snyder*, over 50 years ago. Far more doubtful is whether the trial court's neglectful failures can satisfy present constitutional standards. By excluding petitioners' attorneys from the jury inspection, the trial court violated petitioners' right to counsel at every critical stage of the proceedings against them. See, *e. g.*, *Estelle* v. *Smith*, 451 U. S. 454 (1981) (pretrial psychiatric examination); *Mempa* v. *Rhay*, 389 U. S. 128 (1967) (sentencing); *United States* v. *Wade*, 388 U. S. 218 (1967) (pretrial identification procedure). Furthermore, the trial judge's failure to keep a record of the jury inspection contravenes this Court's insistence that the unique nature of the death penalty demands uniquely stringent policing of the factfinding process. See *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).

Because petitioners have raised substantial federal constitutional issues that take on added urgency in light of the death sentences pending against them, I dissent from the Court's denial of certiorari.

Rehearing Denied

No. 82–1246. BOSE CORP. *v.* CONSUMERS UNION OF UNITED STATES, INC., 466 U. S. 485;

No. 82–1554. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* WASHINGTON, 466 U. S. 668;

No. 82–2056. ESCONDIDO MUTUAL WATER CO. ET AL. *v.* LA JOLLA BAND OF MISSION INDIANS ET AL., 466 U. S. 765; and

No. 83–1521. WEISS *v.* EMPLOYER-SHEET METAL WORKERS LOCAL 544 PENSION TRUST PLAN ET AL., 466 U. S. 972. Petitions for rehearing denied.

No. 83-1547. NOVEL *v.* LOUISIANA EXPOSITION ET AL., 466 U. S. 973;

No. 83-1574. CITY OF PERRYTON, TEXAS *v.* JACKS ET UX., 466 U. S. 973;

No. 83-1627. SAFIR *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL., *ante*, p. 1206;

No. 83-1701. BOSTON *v.* UNITED STATES, 466 U. S. 974;

No. 83-5785. WILLIAMS *v.* ILLINOIS, 466 U. S. 981;

No. 83-5808. PORTER *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 466 U. S. 984;

No. 83-5855. MOSS *v.* UNITED STATES, *ante*, p. 1207;

No. 83-6249. MILESKI *v.* MARYLAND, *ante*, p. 1207;

No. 83-6346. TICHNELL *v.* MARYLAND; and CALHOUN *v.* MARYLAND, 466 U. S. 993;

No. 83-6430. HENRY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 466 U. S. 993;

No. 83-6583. FOSTER *v.* STRICKLAND, WARDEN, ET AL., 466 U. S. 993; and

No. 83-6604. VENKATESAN *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL UNION 545-D, *ante*, p. 1218. Petitions for rehearing denied.

No. 82-1474. HOOVER ET AL. *v.* RONWIN ET AL., 466 U. S. 558. Petition for rehearing denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 82-6840. JAMES *v.* KENTUCKY, 466 U. S. 341; and

No. 83-1288. CRIM *v.* HUNTER, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, 465 U. S. 1080. Petitions for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 83-5432 (A-1022). BALDWIN *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, *ante*, p. 1220. Application to suspend the effect of the order denying certiorari, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. Petition for rehearing denied. JUSTICE BRENNAN would grant rehearing.

No. 83-6296. ROBINSON *v.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, 466 U. S. 941. Motion for leave to file petition for rehearing denied.

JUNE 26, 1984

Dismissal Under Rule 53

No. 83–1874. MACDONALD *v.* SUPERIOR COURT OF CALIFORNIA, MARIN COUNTY (MOUNTANOS, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed under this Court's Rule 53.

INDEX

ABANDONMENT OF RAILROAD LINES. See **Interstate Commerce Act.**

ABSTENTION. See **Jurisdiction, 1.**

ACCESS OF PUBLIC TO PRETRIAL SUPPRESSION HEARINGS. See **Constitutional Law, X.**

ADMINISTRATIVE ADJUDICATION OF DISABILITY BENEFIT CLAIMS. See **Social Security Act.**

ADVERTISING ALCOHOLIC BEVERAGES. See **Federal Communications Commission.**

AGRICULTURAL FAIR PRACTICES ACT OF 1967.

Farmers' associations—Pre-emption of state law.—Act's provisions permitting individual farmers and other producers of agricultural commodities to join voluntarily in cooperative associations, and prohibiting such associations from interfering with such individuals' rights, pre-empts Michigan Act insofar as it provides for accreditation of producers' associations to serve as exclusive bargaining agent for all producers of a particular commodity, to collect service fees from nonmember producers, and to force them to sell their products under terms established by association. Michigan Canners & Freezers Assn. v. Agricultural Marketing and Bargaining Bd., p. 461.

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Milk market orders—Judicial review—Consumers' standing to sue.—Individual consumers of fluid dairy products have no standing to obtain judicial review of Secretary of Agriculture's milk market orders, issued under Act, setting minimum prices that handlers (those who process dairy products) must pay to dairy farmers for "reconstituted milk." Block v. Community Nutrition Institute, p. 340.

AIRPLANE ACCIDENTS. See **Federal Tort Claims Act.**

AIR POLLUTION. See **Clean Air Act.**

ALASKA. See **Constitutional Law, I, 2.**

ALCOHOLIC BEVERAGES ADVERTISING. See **Federal Communications Commission.**

ALIENS. See **Constitutional Law, V; Immigration and Nationality Act of 1952; National Labor Relations Act.**

ANTITRUST ACTS. See also **Motor Carrier Act of 1980.**

Conspiracies—Parent corporation and subsidiary.—A parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of § 1 of Sherman Act. Copperweld Corp. v. Independence Tube Corp., p. 752.

APPORTIONMENT OF WATERS BETWEEN STATES. See **Water Rights.**

ARIZONA. See **Constitutional Law, II, 2.**

ARMED FORCES. See **Garnishment.**

ASSISTANCE OF COUNSEL. See **Constitutional Law, VIII.**

ATTORNEYS' PROMOTIONS IN PARTNERSHIP FIRMS. See **Civil Rights Act of 1964, 2.**

BACKPAY AWARDS. See **National Labor Relations Act.**

BIAS OF JURORS. See **Constitutional Law, IX.**

BONNEVILLE POWER ADMINISTRATION'S SALES OF HYDROELECTRIC POWER. See **Pacific Northwest Electric Power Planning and Conservation Act.**

BONNEVILLE PROJECT ACT OF 1937. See **Pacific Northwest Electric Power Planning and Conservation Act.**

BREATH-ANALYSIS TESTS. See **Constitutional Law, III, 1.**

"BUBBLE CONCEPT" AS TO AIR-POLLUTION CONTROL. See **Clean Air Act.**

BURDEN OF PROOF. See **Water Rights.**

CABLE TELEVISION ADVERTISING OF ALCOHOLIC BEVERAGES. See **Federal Communications Commission.**

CALIFORNIA. See **Postal Service.**

CAPITAL PUNISHMENT. See **Constitutional Law, II, 2.**

CERTIFICATION OF AIRCRAFT BY FEDERAL AVIATION AGENCY. See **Federal Tort Claims Act.**

CERTIORARI.

Improvident grant of writ—Validity of state statute.—Writ of certiorari was dismissed as improvidently granted since case did not provide an appropriate vehicle for determining constitutionality of a New York statute prohibiting loitering in a public place for purpose of engaging in, or solicit-

CERTIORARI—Continued.

ing another to engage in, deviate sexual behavior. New York v. Uplinger, p. 246.

CHARITABLE ORGANIZATIONS' FUNDRAISING EXPENSES. See **Constitutional Law,** VI, 1.

CITIZENSHIP REQUIREMENT FOR NOTARIES PUBLIC. See **Constitutional Law,** V.

CIVIL RIGHTS ACT OF 1866.

Employment discrimination—Suit for individual discrimination—Effect of earlier class action.—Petitioner bank employees were not precluded from maintaining an action against bank, alleging that each petitioner had been denied a promotion because of race in violation of 42 U. S. C. § 1981, by fact that they were members of class represented in an earlier class action where it was held that bank had not engaged in a pattern or practice of racial discrimination. Cooper v. Federal Reserve Bank of Richmond, p. 867.

CIVIL RIGHTS ACT OF 1871.

Conspiracy between public defenders and state officials—Public defenders' immunity.—Where respondent, whose state-court conviction was affirmed on appeal, filed an action in Federal District Court under 42 U. S. C. § 1983 seeking to recover damages from petitioner public defenders who had represented him in state proceedings, allegations that petitioners had conspired with various state officials to secure respondent's conviction were sufficient to assert conduct "under color of" state law for purposes of § 1983; petitioners were not immune from § 1983 liability for such alleged intentional misconduct. Tower v. Glover, p. 914.

CIVIL RIGHTS ACT OF 1964.

1. *Employment discrimination—Consent decree—Enforcement or modification.*—Where a consent decree was entered in a class action by black members of Memphis Fire Department alleging racial discrimination in hiring and promotions in violation of Act's Title VII, and, when a subsequent reduction of city employees was required, District Court preliminarily enjoined Department from following its seniority system, resulting in layoffs of white employees with more seniority than retained black employees, such injunction could not be justified either as an effort to enforce or to modify consent decree; litigation was not moot even though all employees affected by layoffs had been restored to duty or offered back their old positions. Firefighters v. Stotts, p. 561.

2. *Sex discrimination—Law firm partnership—Failure to advance female associate to partnership.*—In petitioner's action against respondent law firm alleging that (1) when she accepted employment with respondent as an associate she relied on representation that associates would be con-

CIVIL RIGHTS ACT OF 1964—Continued.

sidered for partnership "on a fair and equal basis," (2) such promise created a binding employment contract, and (3) respondent discriminated on the basis of sex when it failed to invite her to become a partner, complaint stated a claim under Title VII of Act. Hishon v. King & Spalding, p. 69.

CIVIL RIGHTS ACT OF 1968. See **Jurisdiction, 2.**

CLASS-ACTION JUDGMENT AS AFFECTING SUBSEQUENT INDIVIDUAL SUITS BY CLASS MEMBERS. See **Civil Rights Act of 1866.**

CLAYTON ACT. See **Antitrust Acts.**

CLEAN AIR ACT.

"Stationary source" of air pollution—Plantwide definition.—Where, pursuant to Act, Environmental Protection Agency promulgated regulations authorizing States to adopt a plantwide definition of statutory term "stationary source" of air pollution under which a plant may install or modify equipment without meeting permit conditions if total plant emissions are not increased, EPA's plantwide definition was a permissible construction of statute. Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., p. 837.

CLOSING PRETRIAL SUPPRESSION HEARINGS TO PUBLIC. See **Constitutional Law, X.**

COLORADO. See **Water Rights.**

COLOR OF STATE LAW. See **Civil Rights Act of 1871.**

COMMERCE CLAUSE. See **Constitutional Law, I.**

COMMUNICATIONS ACT OF 1934. See **Federal Communications Commission.**

COMPREHENSIVE EMPLOYMENT AND TRAINING ACT. See **Estoppel.**

CONDEMNATION ACTIONS. See **Constitutional Law, IV; Interstate Commerce Act; Jurisdiction, 1.**

CONFRONTATION CLAUSE. See **Securities and Exchange Commission.**

CONSENT DECREES. See **Civil Rights Act of 1964, 1.**

CONSPIRACY. See **Antitrust Acts; Civil Rights Act of 1871.**

CONSTITUTIONAL LAW. See also **Certiorari; Criminal Law; Federal Communications Commission; Jurisdiction; National Labor Relations Act; Securities and Exchange Commission.**

I. Commerce Clause.

1. *State wholesale gross receipts tax—Validity.*—A West Virginia statute imposing a gross receipts tax on wholesale businesses but exempting

CONSTITUTIONAL LAW—Continued.

local manufacturers, who are subject to a higher manufacturing tax, unconstitutionally discriminates against interstate commerce. Armco Inc. v. Hardesty, p. 638.

2. *Timber taken from state lands—Processing in State prior to export.*—Court of Appeals erred in holding that Alaska's requirement that timber taken from state lands be processed within State prior to export was authorized by Congress' endorsement of a similar requirement as to timber taken from federal lands in Alaska, and thus did not violate Commerce Clause. South-Central Timber Development, Inc. v. Wunnicke, p. 82.

II. Double Jeopardy.

1. *Guilty pleas to lesser included offenses—Trial on greater charges.*—Where, as a result of a killing and a theft of property, respondent was indicted on counts of murder, involuntary manslaughter, aggravated robbery, and grand theft, and state trial court, over State's objection, accepted guilty pleas to lesser included offenses of involuntary manslaughter and grand theft, court erred in dismissing murder and aggravated robbery charges (to which respondent pleaded not guilty) on ground that Double Jeopardy Clause prohibited State from continuing prosecution on those charges. Ohio v. Johnson, p. 493.

2. *Murder conviction—Life sentence—Death penalty on resentencing.*—Double Jeopardy Clause prohibited Arizona from sentencing respondent to death where (1) jury convicted him of first-degree murder and armed robbery and trial judge, after sentencing hearing, found no aggravating or mitigating circumstances and, as required by state law, sentenced respondent on murder conviction to life imprisonment without possibility of parole for 25 years, (2) Arizona Supreme Court held that trial judge erred in interpreting statutory aggravating circumstance of killing for "pecuniary gain" as applying only to contract killings, and (3) after a new sentencing hearing on remand, trial court sentenced respondent to death. Arizona v. Rumsey, p. 203.

III. Due Process.

1. *Breath-analysis tests—Preservation of breath samples.*—Due process does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis test results at trial; thus, Constitution was not violated by State's failure to preserve samples of breath of respondents, who were charged with drunken driving and who sought to suppress test results on ground that they could have used samples to impeach results. California v. Trombetta, p. 479.

2. *Multiemployer pension plans—Employer's withdrawal liability.*—Due Process Clause of Fifth Amendment was not violated by application, during 5-month period prior to enactment of Multiemployer Pension Plan Amendments Act of 1980, of Act's provisions requiring an employer withdrawing from a multiemployer pension plan to pay plan employer's pro-

CONSTITUTIONAL LAW—Continued.

portionate share of plan's "unfunded vested benefits." Pension Benefit Guaranty Corporation v. R. A. Gray & Co., p. 717.

3. *Pretrial detention of accused juvenile delinquent—Validity of state statute.*—Due Process Clause was not violated by a New York statute authorizing pretrial detention of an accused juvenile delinquent based on a finding that there was a "serious risk" that juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." Schall v. Martin, p. 253.

IV. Eminent Domain.

1. *Condemnation action—Time of taking—Interest on award.*—Where (1) Government filed a condemnation complaint against petitioner under 42 U. S. C. § 257 in 1978, (2) District Court ultimately entered judgment awarding petitioner a specific amount, plus interest from date of complaint until Government deposited adjudicated value of land with court, and (3) Government deposited amount and acquired title on March 26, 1982, taking of petitioner's land—entitling it to just compensation under Fifth Amendment—occurred on latter date and, because award was paid on that date, no interest was due thereon. Kirby Forest Industries, Inc. v. United States, p. 1.

2. *Taking of property for "public use"—Validity of Hawaii statute.*—"Public use" requirement of Fifth Amendment was not violated by Hawaii statute creating a land condemnation scheme whereby title to real property was taken from owners and transferred to lessees in order to reduce concentration of land ownership. Hawaii Housing Authority v. Midkiff, p. 229.

V. Equal Protection of the Laws.

Notaries public—Citizenship requirement.—Under applicable "strict scrutiny" standard of judicial review, Texas statute requiring that a notary public be a United States' citizen violated resident aliens' rights under Equal Protection Clause. Bernal v. Fainter, p. 216.

VI. Freedom of Speech.

1. *Charitable organizations—Limitation of fundraising expenses—Validity of statute.*—A Maryland statute prohibiting a charitable organization, in connection with any fundraising activity, from paying expenses of more than 25% of amount raised is overbroad and violates First Amendment, regardless of provision authorizing a waiver where limitation would effectively prevent organization from raising contributions; respondent professional fundraiser had standing to challenge statute in a state-court action alleging that it regularly charged certain customers more than 25% limitation, that one customer was reluctant to enter contract because of limitation, and that petitioner Secretary of State had threatened prosecu-

CONSTITUTIONAL LAW—Continued.
tion under statute. Secretary of State of Md. v. Joseph H. Munson Co., p. 947.

2. *Defamation action—Discovery—Protective order.*—Where, in a defamation action arising from newspaper stories about a religious foundation and its leader, Washington state court ordered discovery disclosure by plaintiffs of information concerning foundation members and donors, and, pursuant to state discovery Rules, court also issued a protective order prohibiting defendants from publishing, disseminating, or using such information in any way except where necessary to prepare for and try case, protective order did not violate First Amendment. Seattle Times Co. v. Rhinehart, p. 20.

VII. Privilege against Self-Incrimination.

Miranda warnings—"Public safety" exception.—Where (1) a rape victim told police that assailant had just entered a nearby supermarket and had a gun, (2) officer spotted respondent (who matched description given by victim) in store and caught him after a chase, (3) after frisking respondent, discovering an empty holster, and handcuffing him, officer asked where gun was, (4) respondent nodded and said that "the gun is over there," and (5) officer then retrieved gun, formally arrested respondent, and gave *Miranda* warnings, gun and respondent's initial statement, as well as his subsequent statements, were admissible in a state prosecution for criminal possession of a weapon, notwithstanding officer's failure to give *Miranda* warnings before attempting to locate gun, since situation warranted a "public safety" exception to *Miranda* requirements. New York v. Quarles, p. 649.

VIII. Right to Counsel.

1. *Exclusionary rule—"Inevitable discovery" exception.*—Where (1) following respondent's arraignment, police informed his counsel that they would drive respondent to another city without questioning him, but an officer began a conversation that resulted in respondent's making incriminating statements and directing police to victim's body, and (2) extensive search of area that was in progress was then terminated, state court, at a trial that resulted in respondent's murder conviction, properly admitted evidence as to body's location and condition (respondent's statements obtained in violation of his Sixth Amendment right to counsel not having been offered in evidence) on ground that it would inevitably have been discovered even if no constitutional violation had taken place. Nix v. Williams, p. 431.

2. *Prisoners—Administrative detention.*—Respondent federal prisoners—who were put in administrative isolated detention for periods of from 8 to 19 months during investigations of murders of fellow inmates, were released from such detention when they were arraigned on federal indict-

CONSTITUTIONAL LAW—Continued.

ments and counsel was appointed, and were ultimately convicted of murder—were not constitutionally entitled to appointment of counsel while they were in administrative detention and before any adversary judicial proceedings had been initiated against them. United States v. Gouveia, p. 180.

IX. Right to Jury Trial.

Jurors' impartiality—Pretrial publicity.—Where (1) respondent was convicted of murder and rape after a state-court jury trial, but on appeal was granted a new trial, (2) at second trial, court denied respondent's motions for a change of venue on asserted ground that publicity precluded selection of an unbiased jury, (3) respondent was again convicted of murder, and conviction was affirmed on appeal, (4) Federal District Court, denying habeas corpus relief, rejected claim that respondent's right to a fair trial by an impartial jury under Sixth and Fourteenth Amendments had been violated, and (5) Court of Appeals reversed, jurors' *voir dire* testimony at second trial and record of publicity did not reveal kind of "wave of public passion" that would have made a fair trial unlikely; record did not overcome presumption of correctness, under 28 U. S. C. § 2254(d), of trial court's findings related to seating a juror and alternate jurors over respondent's challenges for cause. Patton v. Yount, p. 1025.

X. Right to Public Trial.

Wiretap evidence—Closing pretrial suppression hearing to public.—Where, prior to petitioners' trial for violations of state racketeering and gambling statutes, (1) State moved to close to public a suppression hearing as to evidence relating to authorized wiretaps, (2) court ordered closure over petitioners' objections, finding that insofar as wiretap evidence related to alleged offenders not then on trial, evidence would be tainted if made public and could not be used in future prosecutions, and (3) less than 2½ hours of 7-day hearing were devoted to playing wiretap tapes, only a few of which involved persons not then before court, closure of entire hearing was unjustified under Sixth Amendment public trial guarantee. Waller v. Georgia, p. 39.

XI. Taking of Property.

EPA's use and disclosure of data—"Taking" for "public" use.—With regard to Federal Insecticide, Fungicide, and Rodenticide Act's provisions authorizing Environmental Protection Agency to consider, in connection with an application for registration of a covered product, a prior applicant's data constituting a trade secret under state law, and to disclose such data to public, consideration or disclosure of prior applicant's data submitted before October 22, 1972, or after September 30, 1978, does not effect a "taking" for purposes of Taking Clause, but consideration or disclosure of data submitted between those dates may constitute a "taking" under certain conditions and would be for a "public" rather than a "private" use;

CONSTITUTIONAL LAW—Continued.

since Tucker Act remedy is available for any such "taking," District Court erred in enjoining EPA from acting under FIFRA's provisions. Ruckelshaus v. Monsanto Co., p. 986.

CONSUMER SUITS. See **Agricultural Marketing Agreement Act of 1937.**

CONTRACT CLAUSE. See **Constitutional Law, III, 2.**

CONTRACTOR'S IMMUNITY FROM LIABILITY FOR INJURIES TO SUBCONTRACTOR'S EMPLOYEES. See **Longshoremen's and Harbor Workers' Compensation Act.**

COOPERATIVE ASSOCIATIONS. See **Agricultural Fair Practices Act of 1967.**

COPYRIGHT REVISION ACT OF 1976. See **Federal Communications Commission.**

CRIMINAL LAW. See also **Certiorari; Constitutional Law, II; III, 1; VII–X.**

Plea bargaining—Enforcement of prosecutor's sentencing offer.—Where (1) after respondent was convicted of burglary, assault, and murder charges, State Supreme Court set aside murder conviction, (2) deputy prosecutor then proposed that in exchange for a guilty plea to a charge of accessory after a felony murder, prosecutor would recommend a 21-year sentence to be served concurrently with burglary and assault sentences, (3) when respondent communicated acceptance of offer, prosecutor withdrew it and made a second offer with sentence to be served consecutively to other sentences, and (4) after respondent accepted, and was sentenced pursuant to, second offer, he sought federal habeas corpus relief to enforce first offer, respondent's acceptance of first proposed plea bargain did not create a constitutional right to have bargain specifically enforced, and he could not successfully attack his subsequent guilty plea. Mabry v. Johnson, p. 504.

CUSTODIAL INTERROGATIONS. See **Constitutional Law, VII.**

DEADLINES FOR ADMINISTRATIVE ADJUDICATION OF DISABILITY BENEFIT CLAIMS. See **Social Security Act.**

DEATH PENALTY. See **Constitutional Law, II, 2.**

DEFAMATION. See **Constitutional Law, VI, 2.**

DEPORTATION OF ALIENS. See **Immigration and Nationality Act of 1952.**

DETENTION OF ACCUSED JUVENILE DELINQUENTS. See **Constitutional Law, III, 3.**

DEVIATE SEXUAL BEHAVIOR. See **Certiorari.**

DISABILITY BENEFITS. See Social Security Act.

DISCLOSURE OF INFORMATION BY ENVIRONMENTAL PROTECTION AGENCY. See Constitutional Law, XI.

DISCOVERY IN DEFAMATION ACTIONS. See Constitutional Law, VI, 2.

"DISCRETIONARY FUNCTION" EXCEPTION OF FEDERAL TORT CLAIMS ACT. See Federal Tort Claims Act.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See Constitutional Law, I, 1.

DISCRIMINATION BASED ON CITIZENSHIP. See Constitutional Law, V.

DISCRIMINATION BASED ON RACE. See Civil Rights Act of 1866; Civil Rights Act of 1964, 1.

DISCRIMINATION BASED ON SEX. See Civil Rights Act of 1964, 2.

DISCRIMINATION IN EMPLOYMENT. See Civil Rights Act of 1866; Civil Rights Act of 1964.

DISTRICT COURTS. See Jurisdiction, 1.

DIVERSION OF WATERS. See Water Rights.

DOUBLE JEOPARDY. See Constitutional Law, II.

DRUNKEN DRIVING. See Constitutional Law, III, 1.

DUE PROCESS. See Constitutional Law, III; Securities and Exchange Commission.

ELECTIONS OF UNION OFFICERS. See Labor-Management Reporting and Disclosure Act of 1959.

EMINENT DOMAIN. See Constitutional Law, IV; Interstate Commerce Act; Jurisdiction, 1.

EMPLOYEE RETIREMENT INCOME SECURITY ACT. See Constitutional Law, III, 2.

EMPLOYER AND EMPLOYEES. See Civil Rights Act of 1866; Civil Rights Act of 1964; Constitutional Law, III, 2; Federal Employees' Compensation Act; Garnishment; Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act.

EMPLOYER'S REPORTING ILLEGAL ALIEN EMPLOYEES TO IMMIGRATION AND NATURALIZATION SERVICE. See National Labor Relations Act.

EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1866; Civil Rights Act of 1964.

ENVIRONMENTAL PROTECTION AGENCY. See **Clean Air Act; Constitutional Law,** XI.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** V.

ESTOPPEL.

Medicare overpayments—Repayment to Government—Fiscal intermediary's erroneous advice.—Where (1) respondent received Government reimbursement, through a fiscal intermediary, for respondent's costs for home health care services it provided under Medicare program, (2) an official of intermediary gave erroneous advice to respondent that it need not deduct from such costs salaries of its employees paid by a federal grant under Comprehensive Employment and Training Act, and (3) ultimately repayment of Medicare overpayments was sought from respondent, Government was not estopped from recovering funds, since respondent did not demonstrate that traditional elements of an estoppel were present with respect to either its change in position or its reliance on advice of intermediary's official. Heckler v. Community Health Services of Crawford County, Inc., p. 51.

EVIDENCE. See **Constitutional Law,** III, 1; VIII, 1; **Water Rights.**

EXCLUDING PUBLIC FROM PRETRIAL SUPPRESSION HEARINGS. See **Constitutional Law,** X.

EXCLUSIONARY RULE. See **Constitutional Law,** VIII, 1.

EXPORTATION OF TIMBER. See **Constitutional Law,** I, 2.

FARMERS' ASSOCIATIONS. See **Agricultural Fair Practices Act of 1967.**

FEDERAL AVIATION ACT OF 1958. See **Federal Tort Claims Act.**

FEDERAL AVIATION AGENCY'S CERTIFICATION OF AIRCRAFT. See **Federal Tort Claims Act.**

FEDERAL COMMUNICATIONS COMMISSION.

Cable television—Advertising alcoholic beverages—Pre-emption of state law.—In view of Commission's regulations governing cable television, application of Oklahoma's ban on advertising of alcoholic beverages to out-of-state signals carried by cable television systems in Oklahoma was pre-empted by federal law; Twenty-first Amendment did not save Oklahoma's advertising ban from pre-emption. Capital Cities Cable, Inc. v. Crisp, p. 691.

FEDERAL EMPLOYEES' COMPENSATION ACT.

Third-party liability to employee—Damages award or settlement—Government's right to reimbursement.—Under pertinent provision of Act, where Government has paid compensation to its employee or his beneficiaries, Government is entitled to reimbursement from any damages award

FEDERAL EMPLOYEES' COMPENSATION ACT—Continued.

or settlement made in satisfaction of third-party liability to employee or his beneficiaries for personal injury or death, regardless of whether award or settlement was for losses other than medical expenses and lost wages (such as pain and suffering). United States v. Lorenzetti, p. 167.

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT. See **Constitutional Law, XI.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Civil Rights Act of 1866.**

FEDERAL-STATE RELATIONS. See **Agricultural Fair Practices Act of 1967; Clean Air Act; Federal Communications Commission; Garnishment; Interstate Commerce Act; Jurisdiction, 2; Postal Service.**

FEDERAL TORT CLAIMS ACT.

"Discretionary function" exception—Airplane accidents—FAA's certification of aircraft.—Act's "discretionary function" exception barred respondents' wrongful-death and property damage actions against Government resulting from airplane accidents, where respondents alleged that Federal Aviation Agency was negligent in certifying aircraft in question as safe for use in commercial aviation under Agency's program of "spot checking" aircraft manufacturers' work to ensure that aircraft met Agency's safety regulations. United States v. Varig Airlines, p. 797.

FEDERAL TRADE COMMISSION ACT. See **Antitrust Acts.**

FIFTH AMENDMENT. See **Constitutional Law, II; III, 2; IV; VII; XI; Jurisdiction, 1; Securities and Exchange Commission.**

FIRST AMENDMENT. See **Constitutional Law, VI; National Labor Relations Act.**

FOURTEENTH AMENDMENT. See **Constitutional Law, III, 1, 3; V; IX.**

FOURTH AMENDMENT. See **Securities and Exchange Commission.**

FREEDOM OF SPEECH. See **Constitutional Law, VI.**

FUNDRAISING EXPENSES OF CHARITABLE ORGANIZATIONS. See **Constitutional Law, VI, 1.**

GARNISHMENT.

Government employee's wages—Government's liability.—Under 42 U. S. C. § 659(f), Government cannot be held liable to its employee for honoring a writ of garnishment—such as one from an Alabama court directing Air Force's withholding from pay of respondent officer, who was stationed in Alaska, to satisfy court's judgment against respondent for alimony and child support—where writ is "regular on its face" and has been

GARNISHMENT—Continued.

issued by a court with subject-matter jurisdiction, it not being necessary that court have personal jurisdiction over employee. United States v. Morton, p. 822.

GOVERNMENT EMPLOYEES. See **Civil Rights Act of 1964, 1; Federal Employees' Compensation Act; Garnishment.**

GOVERNMENT'S SUBROGATION RIGHTS. See **Federal Employees' Compensation Act.**

GROSS RECEIPTS TAXES. See **Constitutional Law, I, 1.**

GUILTY PLEAS. See **Constitutional Law, II, 1; Criminal Law.**

HABEAS CORPUS. See **Constitutional Law, IX.**

HARBOR WORKERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

HAWAII. See **Constitutional Law, IV, 2; Jurisdiction, 1.**

HYDROELECTRIC POWER. See **Pacific Northwest Electric Power Planning and Conservation Act.**

IMMIGRATION AND NATIONALITY ACT OF 1952. See also **National Labor Relations Act.**

Aliens—Deportation.—Under § 243(h) of Act—which prior to amendment by Refugee Act of 1980 authorized withholding deportation of an alien if he "would be subject to persecution," and which after amendment authorizes withholding deportation if his life or freedom "would be threatened"—an alien must establish a "clear probability of persecution," not just a "well-founded fear of persecution," to avoid deportation. INS v. Stevic, p. 407.

IMMUNITY OF CONTRACTOR FROM LIABILITY FOR INJURIES TO SUBCONTRACTOR'S EMPLOYEES. See **Longshoremen's and Harbor Workers' Compensation Act.**

IMMUNITY OF POSTAL SERVICE FROM SUIT. See **Postal Service.**

IMMUNITY OF PUBLIC DEFENDERS FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871.**

IMPAIRMENT OF CONTRACTS. See **Constitutional Law, III, 2.**

IMPARTIALITY OF JURORS. See **Constitutional Law, IX.**

IMPROVIDENT GRANT OF CERTIORARI. See **Certiorari.**

INCOME TAXES. See **Postal Service.**

INDIANS. See **Jurisdiction, 2.**

"INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE. See **Constitutional Law,** VIII, 1.

INTEREST ON EMINENT DOMAIN AWARDS. See **Constitutional Law,** IV, 1.

INTERSTATE COMMERCE. See **Constitutional Law,** I; **Interstate Commerce Act; Motor Carrier Act of 1980.**

INTERSTATE COMMERCE ACT. See also **Motor Carrier Act of 1980.**

Abandonment of railroad line—Pre-emption of state law.—Where (1) appellee rail carrier, pursuant to Act, obtained a certificate from Interstate Commerce Commission authorizing abandonment of a particular line after Minnesota shippers withdrew offer to subsidize operation of Minnesota segment of line, and (2) shippers then formed appellant carrier, planning to use a Minnesota statute to condemn such segment, appellant's proposed application of Minnesota statute was not pre-empted by Act. Hayfield Northern R. Co. v. Chicago & North Western Transportation Co., p. 622.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act; Motor Carrier Act of 1980.**

"INTRA-ENTERPRISE CONSPIRACY" DOCTRINE. See **Antitrust Acts.**

JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS. See **Agricultural Marketing Agreement Act of 1937.**

JUDICIAL SUPERVISION OF UNION OFFICERS' ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

JURISDICTION. See also **Garnishment.**

1. *Federal District Court—Abstention—Validity of state statute.*—Federal District Court was not required to abstain from exercising its jurisdiction over action by owners of land in Hawaii challenging constitutionality, under Fifth Amendment, of Hawaii statute creating a condemnation scheme whereby title to real property was taken from owners and transferred to lessees in order to reduce concentration of land ownership. Hawaii Housing Authority v. Midkiff, p. 229.

2. *North Dakota courts—Action by Indian Tribe.*—Under applicable federal and state statutes, no federal law or policy required North Dakota courts to forgo jurisdiction of petitioner Indian Tribe's suit alleging negligence and breach of a contract under which respondent North Dakota corporation designed and built a water-supply system on petitioner's reservation in North Dakota. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C., p. 138.

JURORS' IMPARTIALITY. See **Constitutional Law,** IX.

JUST COMPENSATION CLAUSE. See **Constitutional Law,** IV; **Jurisdiction,** 1.

JUVENILE DELINQUENTS. See **Constitutional Law,** III, 3.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

Election of union officers—Judicial supervision.—Where respondent union members brought suit alleging that union and its officers had violated provisions of Title I of Act establishing various protections for members involved in union elections, District Court overstepped bounds of "appropriate" relief under Title I when it enjoined an ongoing election of union officers and ordered that a new election be held pursuant to court-imposed procedures. Furniture Moving Drivers v. Crowley, p. 526.

LABOR UNION OFFICERS' ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

LAW FIRM PARTNERSHIPS. See **Civil Rights Act of 1964,** 2.

LESSER INCLUDED OFFENSES. See **Constitutional Law,** II, 1.

LIFE SENTENCE FOR MURDER AS PRECLUDING DEATH PENALTY ON RESENTENCING. See **Constitutional Law,** II, 2.

LIMITATIONS ON CHARITABLE ORGANIZATIONS' FUND-RAISING EXPENSES. See **Constitutional Law,** VI, 1.

LOITERING. See **Certiorari.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

"Employers'" immunity from tort liability—General contractors.—Act's § 5(a) grant of immunity to an "employer" from tort liability for work-related injuries of its employees if employer secures payment of compensation to employees under Act applies to general contractors who secure payment of compensation for injuries to subcontractors' employees pursuant to § 4(a) of Act. Washington Metropolitan Area Transit Authority v. Johnson, p. 925.

MARYLAND. See **Constitutional Law,** VI, 1.

MEDICARE. See **Estoppel.**

MICHIGAN. See **Agricultural Fair Practices Act of 1967.**

MILK PRICES. See **Agricultural Marketing Agreement Act of 1937.**

MINNESOTA. See **Interstate Commerce Act.**

MIRANDA WARNINGS. See **Constitutional Law,** VII.

MODIFICATION OF CONSENT DECREES. See **Civil Rights Act of 1964, 1.**

MOOTNESS. See **Civil Rights Act of 1964, 1.**

MOTOR CARRIER ACT OF 1980.

Motor-carrier rate bureaus—ICC's retroactive rejection of tariffs.—Where Interstate Commerce Commission issued an interpretative ruling explaining how it would implement Act's guidelines to which motor-carrier rate bureaus must conform to receive antitrust immunity—such ruling proposing a new remedy to enforce rate-bureau agreements whereby ICC would retroactively reject effective tariffs that had been submitted in violation of such agreements, thus resulting in rate-bureau overcharge liability—proposed new remedy was within ICC's discretionary authority. ICC v. American Trucking Assns., Inc., p. 354.

MOTOR-CARRIER RATE BUREAUS. See **Motor Carrier Act of 1980.**

MULTIEMPLOYER PENSION PLANS. See **Constitutional Law,** III, 2.

NATIONAL LABOR RELATIONS ACT.

Unfair labor practice—Illegal alien employees—Employer's reporting to INS.—Where, after National Labor Relations Board overruled employer's objections to union representation election on asserted ground that certain voters were illegal aliens, employer asked Immigration and Naturalization Service to check employees' status, and, as a result of INS's investigation, some employees voluntarily left country to avoid deportation, NLRB, in holding that employer had violated § 8(a)(3) of Act, reasonably interpreted Act as applying to unfair labor practices committed against undocumented aliens; Court of Appeals erred in modifying NLRB's order so as to require (1) a minimum backpay award regardless of employees' actual economic losses or legal availability for work, (2) employer to draft reinstatement offers in Spanish and to ensure verification of receipt, and (3) holding reinstatement offers open for four years. Sure-Tan, Inc. v. NLRB, p. 883.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act.**

NEW MEXICO. See **Water Rights.**

NEW YORK. See **Certiorari; Constitutional Law,** III, 3.

NORTH DAKOTA. See **Jurisdiction, 2.**

NOTARIES PUBLIC. See **Constitutional Law, V.**

NOTICE TO "TARGETS" OF SECURITIES AND EXCHANGE COMMISSION SUBPOENAS ISSUED TO THIRD PARTIES. See **Securities and Exchange Commission.**

OKLAHOMA. See **Federal Communications Commission.**

OVERPAYMENTS UNDER MEDICARE PROGRAM. See **Estoppel.**

PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT.

Sales of hydroelectric power—Bonneville Power Administration's contracts.—Administrator of Bonneville Power Administration's interpretation of Act with regard to new contracts for Administration's sales of hydroelectric power to direct-service industrial customers under which such customers received more power than they had under earlier contracts, thereby reducing amount of power available to Administration's "preference" customers, was reasonable, and Administrator had broad discretion to negotiate such new contracts. Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., p. 380.

PARENT CORPORATION'S AND SUBSIDIARY'S ANTITRUST LIABILITY. See **Antitrust Acts.**

PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1866.**

PENSION PLANS. See **Constitutional Law,** III, 2.

"PERSECUTION" OF ALIENS AFTER DEPORTATION. See **Immigration and Nationality Act of 1952.**

PESTICIDES. See **Constitutional Law,** XI.

PLEA BARGAINING. See **Criminal Law.**

POLICE INTERROGATIONS. See **Constitutional Law,** VII.

POLLUTION. See **Clean Air Act.**

POSTAL SERVICE.

Immunity from suit—Withholding employees' delinquent taxes—State administrative process.—When appellant State Franchise Tax Board, pursuant to state law, served administrative process on appellee Postal Service to withhold amounts of delinquent state income taxes from wages of certain of appellee's employees, appellee was "sued" within meaning of 39 U. S. C. § 401(1), which provides that appellee may "sue and be sued in its official name," and appellee must respond to appellant's process. Franchise Tax Bd. of Cal. v. USPS, p. 512.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Agricultural Fair Practices Act of 1967; Federal Communications Commission; Interstate Commerce Act.**

PRESERVATION OF BREATH SAMPLES. See **Constitutional Law,** III, 1.

PRETRIAL DETENTION OF ACCUSED JUVENILE DELINQUENTS. See Constitutional Law, III, 3.

PRETRIAL PUBLICITY. See Constitutional Law, IX.

PRISONERS' RIGHT TO COUNSEL DURING CRIMINAL INVESTIGATION. See Constitutional Law, VIII, 2.

PRIVILEGE AGAINST SELF-INCRIMINATION. See Constitutional Law, VII; Securities and Exchange Commission.

PROCESSING OF TIMBER. See Constitutional Law, I, 2.

PROSECUTION'S WITHDRAWAL OF PLEA BARGAINING OFFER. See Criminal Law.

PROTECTIVE ORDERS IN DISCOVERY PROCEEDINGS. See Constitutional Law, VI, 2.

PUBLIC DEFENDERS. See Civil Rights Act of 1871.

PUBLIC DISCLOSURE OF INFORMATION BY ENVIRONMENTAL PROTECTION AGENCY. See Constitutional Law, XI.

PUBLIC EMPLOYEES. See Civil Rights Act of 1964, 1; Federal Employees' Compensation Act; Garnishment.

"PUBLIC SAFETY" EXCEPTION TO MIRANDA REQUIREMENTS. See Constitutional Law, VII.

PUBLIC TRIALS. See Constitutional Law, X.

"PUBLIC USE" OF PROPERTY TAKEN BY EMINENT DOMAIN. See Constitutional Law, IV, 2.

RACIAL DISCRIMINATION. See Civil Rights Act of 1866; Civil Rights Act of 1964, 1.

RAILROADS. See Interstate Commerce Act.

RATES OF MOTOR CARRIERS. See Motor Carrier Act of 1980.

REFUGEE ACT OF 1980. See Immigration and Nationality Act of 1952.

REGISTRATION OF PESTICIDES. See Constitutional Law, XI.

REIMBURSEMENT OF MEDICARE OVERPAYMENTS. See Estoppel.

"RECONSTITUTED MILK" PRICES. See Agricultural Marketing Agreement Act of 1937.

RES JUDICATA. See Civil Rights Act of 1866.

RETIREMENT PENSION PLANS. See Constitutional Law, III, 2.

RETROACTIVE APPLICATION OF STATUTES. See **Constitutional Law, III, 2.**

RIGHT TO COUNSEL. See **Constitutional Law,** VIII.

RIGHT TO FINANCIAL PRIVACY ACT. See **Securities and Exchange Commission.**

RIGHT TO JURY TRIAL. See **Constitutional Law,** IX.

RIGHT TO PETITION GOVERNMENT. See **National Labor Relations Act.**

RIGHT TO PUBLIC TRIAL. See **Constitutional Law,** X.

RIPARIAN RIGHTS. See **Water Rights.**

SALES OF HYDROELECTRIC POWER. See **Pacific Northwest Electric Power Planning and Conservation Act.**

SEARCHES AND SEIZURES. See **Securities and Exchange Commission.**

SECRETARY OF AGRICULTURE'S MILK MARKET ORDERS. See **Agricultural Marketing Agreement Act of 1937.**

SECURITIES ACT OF 1933. See **Securities and Exchange Commission.**

SECURITIES AND EXCHANGE COMMISSION.

Subpoenas issued to third parties—Notice to investigation "targets."—Giving of notice to "targets" of nonpublic investigations into possible violations of securities laws when SEC issues subpoenas to third parties is within SEC's discretion and is not required by Due Process Clause of Fifth Amendment, Confrontation Clause, Self-Incrimination Clause, Fourth Amendment, Securities Act of 1933, or Securities Exchange Act of 1934. SEC v. Jerry T. O'Brien, Inc., p. 735.

SECURITIES EXCHANGE ACT OF 1934. See **Securities and Exchange Commission.**

SECURITIES REGULATION. See **Securities and Exchange Commission.**

SELF-INCRIMINATION. See **Constitutional Law,** VII; **Securities and Exchange Commission.**

SENIORITY SYSTEMS. See **Civil Rights Act of 1964, 1.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964, 2.**

SHERMAN ACT. See **Antitrust Acts.**

SIXTH AMENDMENT. See **Constitutional Law,** VIII–X; **Securities and Exchange Commission.**

SOCIAL SECURITY ACT.

Disability benefit claims—Administrative adjudication—Deadlines.—District Court's injunction—imposing certain mandatory deadlines within which Department of Health and Human Services must act in administrative adjudication of disputed disability benefit claims under Title II of Act—constituted an unwarranted judicial intrusion into pervasively regulated area of claims adjudication under Act. Heckler v. Day, p. 104.

SOLITARY CONFINEMENT. See **Constitutional Law, VIII, 2.**

STAGGERS RAIL ACT OF 1980. See **Interstate Commerce Act.**

STANDING TO SUE. See **Agricultural Marketing Agreement Act of 1937; Constitutional Law, VI, 1.**

STATE-COURT JURISDICTION OVER INDIAN TRIBES' ACTIONS. See **Jurisdiction, 2.**

STATE INCOME TAXES. See **Postal Service.**

STATES' WATER RIGHTS. See **Water Rights.**

STATE WHOLESALE GROSS RECEIPTS TAXES. See **Constitutional Law, I, 1.**

"STATIONARY SOURCE" OF AIR POLLUTION. See **Clean Air Act.**

SUBPOENAS OF SECURITIES AND EXCHANGE COMMISSION. See **Securities and Exchange Commission.**

SUBROGATION RIGHTS OF GOVERNMENT. See **Federal Employees' Compensation Act.**

SUPPRESSION HEARINGS. See **Constitutional Law, X.**

SUPREMACY CLAUSE. See **Federal Communications Commission.**

TAKING OF PROPERTY FOR PUBLIC USE. See **Constitutional Law, IV; XI.**

TARIFFS OF MOTOR CARRIERS. See **Motor Carrier Act of 1980.**

TAXES. See **Constitutional Law, I, 1; Postal Service.**

TELEVISION ADVERTISING OF ALCOHOLIC BEVERAGES. See **Federal Communications Commission.**

TEXAS. See **Constitutional Law, V.**

TIMBER. See **Constitutional Law, I, 2.**

TRADE SECRETS ACT. See **Constitutional Law, XI.**

TUCKER ACT. See **Constitutional Law, XI.**

TWENTY-FIRST AMENDMENT. See **Federal Communications Commission.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION OFFICERS' ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

UNITED NATIONS PROTOCOL RELATING TO STATUS OF REFUGEES. See **Immigration and Nationality Act of 1952.**

UNITED STATES' LIABILITY FOR HONORING WRITS OF GARNISHMENT. See **Garnishment.**

UNITED STATES' TORT LIABILITY. See **Federal Tort Claims Act.**

WASHINGTON. See **Constitutional Law, VI, 2.**

WATER RIGHTS.

Apportionment of waters between States—Burden of proof.—In Colorado's action for equitable apportionment of waters of Vermejo River, Colorado's proof was to be judged by a clear-and-convincing-evidence standard, and Colorado did not meet its burden of proving that its proposed diversion of such waters should be permitted. Colorado v. New Mexico, p. 310.

WEST VIRGINIA. See **Constitutional Law, I, 1.**

WHOLESALE GROSS RECEIPTS TAXES. See **Constitutional Law, I, 1.**

WIRETAPS. See **Constitutional Law, X.**

WITHDRAWAL BY EMPLOYER FROM MULTIEMPLOYER PENSION PLAN. See **Constitutional Law, III, 2.**

WITHHOLDING EMPLOYEES' DELINQUENT TAXES. See **Postal Service.**

WORDS AND PHRASES.

1. *"Discretionary function."* Federal Tort Claims Act, 28 U. S. C. § 2680(a). United States v. Varig Airlines, p. 797.

2. *"Legal process regular on its face."* 42 U. S. C. § 659(f). United States v. Morton, p. 822.

WORKERS' COMPENSATION. See **Federal Employees' Compensation Act; Longshoremen's and Harbor Workers' Compensation Act.**